PROSECUTING POST-PADILLA:
STATE INTERESTS AND THE PURSUIT OF JUSTICE FOR NONCITIZEN DEFENDANTS

HEIDI ALTMAN

ABSTRACT

American state prosecutors are increasingly confronting the question of how to modify their practice, if at all, when prosecuting noncitizen defendants. As a result of recent trends in immigration law and policy, virtually any interaction with the criminal justice system leaves noncitizens, regardless of their lawful or unlawful status, at a very real risk of deportation or other negative immigration penalties. The Supreme Court’s decision in Padilla v. Kentucky, identifying deportation as a penalty directly tied to the criminal process, has prompted a wealth of scholarship, particularly regarding the role of the criminal defense attorney. Yet this scholarship has largely glossed over the role played by the prosecutor, arguably the central actor in determining the outcome of most criminal cases. This Article is a step toward filling that gap.

The Article begins by identifying and exploring emerging trends in state prosecutors’ attitudes and practices regarding immigration penalties that flow from criminal convictions, presenting the results of a survey conducted in the Kings County (Brooklyn) New York District Attorney’s office. Addressing common concerns shared by many state prosecutors, the Article proposes that the informed consideration of immigration consequences does not offend principles of federalism or equity but instead focuses prosecutorial resources on ensuring case outcomes that are proportionate to the charged offense. In Padilla, the Court proposed that plea negotiations are an area in which the interests of the state and the interests of noncitizen defendants converge. Elaborating on this identified convergence of interests, this Article concludes that state prosecutors can best embody their role as stewards of justice and community safety by engaging with immigration penalties during the plea bargaining phase of a case and working with the defense to craft immigration-neutral pleas when appropriate.

TABLE OF CONTENTS

INTRODUCTION .................................................. 2
I. PROSECUTOR AND THE IMMIGRATION PENALTIES OF THE CRIMES THEY PROSECUTE ............................... 7
   A. Immigration Penalties in State Criminal Court ......... 7
   B. Reevaluation of Roles in the Aftermath of Padilla v. Kentucky ......................................................... 13
      i. Padilla v. Kentucky: Deportation as Penalty ............ 13
      ii. Padilla’s Ripples throughout the Criminal Justice System .................................................. 14
   C. Emerging Trends among State Prosecutors ............ 20
      i. Office-wide Policies ....................................... 20
      ii. Attitudes and Practices of Trial-level Prosecutors ...... 22
II. SERVING STATE INTERESTS THROUGH INFORMED CONSIDERATION OF IMMIGRATION PENALTIES ....... 25
   A. The Pursuit of Justice ...................................... 26

* Clinical Teaching Fellow and Supervising Attorney, Center for Applied Legal Studies, Georgetown Law School. I am grateful to the following individuals for generously giving of their time and insight at various stages of this project: Juliet Aiken, Dino Amoroso, Geoffrey Heeren, Robert Johnson, Angie Junck, Dan Kesselbrenner, David Koplow, Nancy Morawetz, Scott Roehm, Andrew Schoenholtz, Philip Schrag, Manuel Vargas, and members of the Violet Underground Writing Workshop. I am also grateful to the many practitioners of criminal and immigration law who shared their experiences and views with me; they are acknowledged individually in note 31 infra.
INTRODUCTION

Carlos¹ has a full life—he is a father to two young daughters, engaged to be married, and has worked as a driver for the same company for nearly a decade. He is a graduate of New York City’s public school system, from elementary school through high school. He is a lawful permanent resident of the United States who left his native Dominican Republic at the age of three. He also, from time to time, has smoked marijuana. When I met Carlos he was facing misdemeanor charges of marijuana possession after getting arrested while walking his grandmother’s dog and smoking a marijuana joint. He had one previous misdemeanor conviction for the same offense and no other criminal record. I served as the immigration attorney working on his case in consultation with his appointed criminal defense attorney.² As such, it was my job to inform Carlos that a conviction of the charges against him would leave him deportable, likely triggering removal proceedings a few years down the road if not immediately.³ No one had ever talked with him before about the immigration consequences of criminal convictions. He was confused and shocked, and didn’t understand how he could be forced to leave his lawful home and his daughters because of two marijuana joints.

Carlos’s criminal defender and I reached out to the Assistant District Attorney (ADA) assigned to his case. She had already offered Carlos a plea deal—a guilty plea to misdemeanor marijuana possession with several days of jail time. We explained to her that this offer meant something very different for Carlos

---

¹ Carlos’s real name has been changed to protect his privacy. He has provided his consent to the use of his story for the purposes of this Article.

² At the time, in early 2011, I served as the Immigration Staff Attorney at the Neighborhood Defender Service of Harlem (NDS), a neighborhood-based public defender office in Northern Manhattan, New York City. NDS’s Immigration Services Project provides consultations to NDS’s defense attorneys and clients on the immigration penalties of pending criminal charges and provides direct legal representation to noncitizen clients in immigration matters.

than for a United States citizen defendant; for Carlos, the true penalty would be not only a few days of jail but also banishment from the only home he’d ever known. We proposed an alternative plea to a disorderly conduct violation, with as much or more jail time as she originally sought. The ADA said she understood, but she couldn’t give Carlos what she saw as preferential treatment by giving him a plea offer she wouldn’t give a citizen. I explained to the ADA that our proposed alternative plea did not give Carlos preferential treatment; on the contrary, it merely corrected for the disproportionate penalty he would suffer should he be convicted of a marijuana-related offense. Negotiations with the ADA dragged on for months. Carlos’s defender and I appealed to her supervisor and had our own supervisor intervene to apply pressure. Carlos gathered letters of support from family and friends, including his daughters’ mother and his boss. He told me he was unable to sleep at night for fear of what would happen to him and his family if the ADA would not offer a plea that would preserve his immigration status. Eventually, she did, and Carlos remains in the United States with his family today.

I begin with Carlos’s story because it illustrates the enormous influence that state prosecutors in the United States wield when prosecuting noncitizen defendants. Had the ADA assigned to Carlos’s case ultimately refused to offer an immigration-neutral plea, Carlos would have either pled guilty to a deportable offense or gone to trial and, very likely, lost. Immigration and Customs Enforcement (ICE) would then have taken him into custody directly from the

4 Those individuals deported on the basis of a criminal conviction are unable to return to the United States lawfully for a period ranging from ten years to a lifetime depending on the nature of the underlying offense. See INA § 212(a)(9)(A), 8 U.S.C. § 1182(a)(9)(A) (2006).

5 Carlos was willing from the outset to serve more time in jail than he would have on the original plea offer in order to avoid the risk of deportation.

6 Carlos’s story is in many ways an exception to the way the criminal justice system usually works, especially for indigent noncitizen defendants. Very few public defender offices have the resources to hire an in-house immigration attorney, and most defenders face such overwhelming caseloads that the consideration of immigration consequences feels like a luxury. See, e.g., Darryl Brown, *Why Padilla Doesn’t Matter (Much)*, 58 UCLA L. REV. 1393, 1397–1413 (2011). A number of immigrant advocacy groups strive to fill this gap by making resources available to public and private defenders regarding the immigration consequences of convictions. See, e.g., DEFENDING IMMIGRANTS PARTNERSHIP, *http://defendingimmigrants.org/* (last visited May 20, 2012), the website of the Defending Immigrants Partnership, a collaborative effort of four organizations working to bring materials and trainings to criminal defense attorneys representing noncitizen clients.

The scope of this Article is limited to the role of state prosecutors during pre-trial plea negotiations in criminal court. The role of federal prosecutors is equally ripe for exploration, and raises some different questions than those addressed here, as federal prosecutors now overwhelmingly spend their time prosecuting crimes featuring immigration status as a principal element of the offense. See *Illegal Reentry Becomes Top Criminal Charge, TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE* (June 10, 2011), *http://trac.syr.edu/immigration/reports/251/* (reporting illegal reentry under 8 U.S.C. § 1326 as “the most commonly recorded lead charge brought by federal prosecutors during the first half of FY2011”). Additionally, the role of federal and state prosecutors when responding to post-conviction motions brought by defendants alleging ineffective assistance of counsel under *Padilla v. Kentucky*, 130 S. Ct. 1473 (2011) is a largely unexamined area that merits attention.

Throughout this Article, I use the term “noncitizen” to refer to any individual present in the United States who is not a citizen of the United States. This term includes: those who are lawfully present, such as lawful permanent residents (colloquially known as “green card holders”), refugees and asylees, and students and visitors on valid visas who are within their authorized period of stay; and those who are present in the United States without authorization, including those who entered without inspection and those who entered lawfully but remained beyond their authorized period of stay. Those noncitizens who are lawfully present in the United States may be removed if the government sustains a charge of removability against them, including the crime-based grounds of removal discussed in greater detail in note 18 infra. See INA § 237(a)(2), 8 U.S.C. § 1227(a)(2) (2006); INA § 212(a)(2), 8 U.S.C. § 1182(a)(2) (2006). Those noncitizens who are present in the United States without authorization are subject to removal simply on the basis of their unlawful presence. See INA § 237(a)(1)(B); 8 U.S.C. § 1227(a)(1)(B) (2006).
New York City jail and placed him in removal proceedings. He would have been held in mandatory, no-bond immigration detention, with no opportunity to ask a judge to consider his release. ICE would likely have transferred him once or twice within its vast nationwide network of detention facilities, forcing him to defend against his deportation from a remote detention center far from his loved ones. Eventually, after months in detention, he would have asked an immigration judge for “cancellation of removal,” a second chance at remaining in the United States. The immigration judge might have granted him this chance, but might just as easily have denied it. Had he been denied, Carlos would have been deported to the Dominican Republic, effectively barred from ever returning to his home and family. His daughters would have been left without a father, and their mother left without the financial support he regularly provided.

In this Article, I argue that the outcome in Carlos’s case was the outcome that justice demanded. The course taken by the prosecutor—engaging with the deportation risks associated with her original plea offer and offering a reasonably commensurate alternative plea that preserved Carlos’s immigration status—was the appropriate and ethical course for a prosecutor to take. I argue, further, that this outcome shouldn’t have required such extraordinary efforts on the part of an unusually resourced defense team; prosecutors should engage in this type of creative bargaining—when appropriate—as a matter of course.

State prosecutors in the United States possess great power over the lives of the noncitizen defendants they prosecute and the lives of their loved ones. This power—largely unexamined despite its evolution over decades—is the result of a confluence of trends involving immigration law, federal immigration

---

9 For a discussion of the most common ways in which ICE identifies removable noncitizens, see infra section I.A.
10 See INA § 236(e); 8 U.S.C. § 1226(e) (2006).
12 Cancellation of removal is a discretionary form of immigration relief available to certain lawful permanent residents who meet strict residency requirements and have not been convicted of an “aggravated felony” as defined in section 101 of the Immigration and Nationality Act. See INA § 240A(a), 8 U.S.C. § 1229b(a) (2006); INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (2006). Cancellation of removal is a discretionary benefit; an immigration judge may only grant such relief if she finds the balance of equities weighs in the applicant’s favor. See In re C-V-T-, 22 I. & N. Dec. 7, 11 (B.I.A. 1998).
13 The average grant rate for “212(c) relief,” the statutory predecessor to cancellation of removal, was 51.5 percent. See Julie K. Rannik, The Anti-Terrorism and Effective Death Penalty Act of 1996: A Death Sentence for the 212(c) Waiver, 28 U. M IAMI INTER-AM. L. REV. 123, 137 n.80 (1996).
14 A recent study of men and women deported from the United States to the Dominican Republic reveals that, in addition to facing public and private discrimination, many deportees experience feelings of abandonment, depression, and estrangement, and are often suicidal. See DAVID C. BROTHERTON & LUIS BARRES, BANISHED TO THE HOMELAND: DOMINICAN DEPORTES AND THEIR STORIES OF EXILE 190-209 (2011). One deportee described his experience with crime-based deportation as follows: “I have four sons who I could see every two weeks while I was in Wyoming Correctional Facility. Eighteen months later, I could not see or touch neither my children nor my wife because we were afraid that, having traveled to the D.R., they would have problems on their return to the United States. This was agony, like living in hell every day. Every night I spent there, alone trying to sleep, I was constantly thinking that the world had ended for me, that I had lost everything, my wife, my children, and my life. . . . A hundred times I had the intention of killing myself but did not have the courage to do it. I was walking like a robot, and everything I was doing was mechanical. I was not feeling that desire to live as earlier in my life. I was dead in life.” Id. at 196–97.
15 Carlos would have been subject to the ten year bar to return applicable to those who have previously been removed from the United States. See INA § 212(a)(9)(A)(ii)(II), 8 U.S.C. § 1182(a)(9)(A)(ii)(II) (2006). Even subsequent to those ten years, he would have remained barred from lawful admission by the same convictions that rendered him deportable in the first place. See INA § 212(a)(8)(A)(ii)(II), 8 U.S.C. § 1182(a)(8)(A)(ii)(II) (2006).
enforcement, and the criminal justice system. Today, noncitizens in criminal court on even the most minor criminal charges face a dizzying array of negative immigration penalties that may flow from their conviction, including deportation, detention, the inability to travel internationally, and preclusion from future immigration benefits such as adjustment to lawful permanent residence or naturalization. Increasingly unforgiving immigration laws enforced by a growing array of federal enforcement programs mean that almost any interaction with the criminal justice system carries a real risk of deportation for any noncitizen, even a longtime lawful permanent resident like Carlos with entrenched family and community ties in the United States.

This reality places unique ethical and professional demands on all players in the criminal justice system when noncitizens are in court. Recognizing this, the United States Supreme Court announced for the first time in 2010 in Padilla v. Kentucky that immigration consequences of criminal convictions are not “collateral” consequences but “penalties . . . intimately related to the criminal process.” The Court announced that criminal defense counsel is therefore constitutionally obligated to thoroughly and competently advise noncitizen defendants as to the deportation risks of guilty pleas. Most pertinent to this Article, Justice Stevens spoke for the Court in noting that the interests of both the defense and the prosecution are served by the “informed consideration” of immigration penalties during plea bargaining.

This Article takes Justice Stevens’s discussion of the overlapping interests of the defense and the prosecution during plea bargaining as a starting place for an analysis of prosecutorial interests and goals when negotiating pleas for noncitizen defendants as to the deportation risks of guilty plea.
defendants. I argue that it is, in fact, in the best interests of local prosecutors to make immigration-neutral plea offers in cases where a reasonable alternative plea is available. This course of action is most in line with the standards governing prosecutorial ethics, which uniformly instruct prosecutors not only to pursue convictions but also to pursue justice and serve as guardians of the communities in which they serve.\(^{26}\)

This Article begins in Part I with an overview of the changes in law and policy that have brought immigration-related penalties directly into state criminal courts. It is in response to these changes in law and policy that the Supreme Court decided Padilla,\(^{27}\) and I go on to consider that decision and what it means for all players in the criminal justice system. Since Padilla, practitioners and scholars alike have focused newfound attention on the responsibilities of the criminal defense attorney when representing noncitizen clients\(^{28}\) and, to a lesser extent, on the role of the judge presiding over noncitizen defendants.\(^{29}\) The role of the prosecutor, however, has been largely unaddressed in the literature and advocacy materials that have emerged since Padilla. Part I concludes by considering how prosecutors across the country are responding to Padilla—both at the macro level of office-wide policy pronouncements and at the micro level of individual trial-level prosecutors. The micro level analysis is based on the results of a survey completed by trial-level prosecutors in the Kings County (Brooklyn), New York District Attorney’s Office,\(^{30}\) as well as my own conversations with practitioners who provide technical support on issues of immigration law and policy to the defense and prosecution bars.\(^{31}\)

In Part II, I consider the prosecutorial interests involved in the prosecution of noncitizen defendants in light of a matrix of measurable prosecutorial goals and objectives created in 2007 by the American Prosecutors Research Institute (APRI).\(^{32}\) I propose that the informed consideration of immigration-related penalties during plea bargaining furthers prosecutorial goals, looking specifically to three broadly defined goals within the APRI matrix. First, I explore how the prosecution of noncitizens implicates the pursuit of fair, impartial and expedient prosecution of defendants. I argue that it is, in fact, in the best interests of local prosecutors to make immigration-neutral plea offers in cases where a reasonable alternative plea is available. This course of action is most in line with the standards governing prosecutorial ethics, which uniformly instruct prosecutors not only to pursue convictions but also to pursue justice and serve as guardians of the communities in which they serve.\(^{26}\)

This Article begins in Part I with an overview of the changes in law and policy that have brought immigration-related penalties directly into state criminal courts. It is in response to these changes in law and policy that the Supreme Court decided Padilla,\(^{27}\) and I go on to consider that decision and what it means for all players in the criminal justice system. Since Padilla, practitioners and scholars alike have focused newfound attention on the responsibilities of the criminal defense attorney when representing noncitizen clients\(^{28}\) and, to a lesser extent, on the role of the judge presiding over noncitizen defendants.\(^{29}\) The role of the prosecutor, however, has been largely unaddressed in the literature and advocacy materials that have emerged since Padilla. Part I concludes by considering how prosecutors across the country are responding to Padilla—both at the macro level of office-wide policy pronouncements and at the micro level of individual trial-level prosecutors. The micro level analysis is based on the results of a survey completed by trial-level prosecutors in the Kings County (Brooklyn), New York District Attorney’s Office,\(^{30}\) as well as my own conversations with practitioners who provide technical support on issues of immigration law and policy to the defense and prosecution bars.\(^{31}\)

In Part II, I consider the prosecutorial interests involved in the prosecution of noncitizen defendants in light of a matrix of measurable prosecutorial goals and objectives created in 2007 by the American Prosecutors Research Institute (APRI).\(^{32}\) I propose that the informed consideration of immigration-related penalties during plea bargaining furthers prosecutorial goals, looking specifically to three broadly defined goals within the APRI matrix. First, I explore how the prosecution of noncitizens implicates the pursuit of fair, impartial and expedient

\(^{26}\) See MODEL RULES OF PROF’L CONDUCT R. 3.8 cmr. n. 1 (2010); NATIONAL PROSECUTION STANDARDS §§ 1-1.1 to 1-1.2 (Nat’l Dist. Att’y’s Ass’n 2009) [hereinafter NDAA NATIONAL PROSECUTION STANDARDS]; ABA STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION § 3-1.2 (1993) [hereinafter ABA STANDARDS, PROSECUTION FUNCTION].

\(^{27}\) See Padilla, 130 S. Ct. at 1478–80 (outlining changes to the immigration law over the past century and finding them to “have dramatically raised the stakes of a noncitizen’s criminal conviction.”).

\(^{28}\) For an overview of the literature addressing the role of criminal defense counsel in light of Padilla, see infra section I.B.ii.


\(^{30}\) The survey was distributed in partnership with the Kings County District Attorney’s office. I am grateful to Dino Amoroso, Deputy District Attorney, with whom I collaborated in the survey’s creation and distribution. I also acknowledge and thank District Attorney Charles Hynes for his participation in this project and his leadership on these issues.

\(^{31}\) Telephone Interview with Ann Benson, Immigration Project Supervising Attorney, Washington Defender Association (Jan. 9, 2012); Telephone Interview with Raha Jorjani, Supervising Attorney and Lecturer, University of California Davis School of Law Immigration Law Clinic (Jan. 2, 2012); Telephone Interview with Angie Junck, Staff Attorney, Immigrant Legal Resource Center (Sept. 14, 2011); Telephone Interview with Dan Kesselbrenner, Executive Director, National Immigration Project of the National Lawyers Guild (July 28, 2011); Telephone Interview with Manuel Vargas, Senior Counsel, Immigrant Defense Project (Aug. 16, 2011); Telephone Interview with Marianne Yang, Director, Immigration Unit, Brooklyn Defender Services (Aug. 5, 2011); Telephone Interview with Sejal Zota, Staff Attorney, National Immigration Project of the National Lawyers Guild (Sept. 20, 2011).

justice, including the integrity or finality of bargained-for convictions. Second, I examine how informed consideration of immigration penalties furthers the stewardship of public safety and the interests of the community in which the prosecutor practices. And third, I consider the prosecution of noncitizens in view of questions regarding the integrity of the prosecution profession, including practice within prevailing norms of professional ethics and the pursuit of the appropriate role of the state prosecutor in light of federalism concerns.

The Article concludes in Part III with a policy proposal for best prosecutorial practices with regard to immigration penalties of criminal offenses. The proposal encourages lead prosecutors to adopt office-wide policies that normalize the consideration of immigration penalties and the use of alternative plea offers, when appropriate, to preserve noncitizen defendants’ immigration status. In addressing the key elements of any such policy, this section identifies the factors that determine when it is appropriate for a prosecutor to modify a plea offer because of these penalties and considers the sources of training for trial-level prosecutors on immigration-related penalties of offenses.

I. PROSECUTORS AND THE IMMIGRATION PENALTIES OF THE CRIMES THEY PROSECUTE

Immigration penalties are a reality in criminal courts across the United States. Even in jurisdictions not traditionally associated with immigrant populations, local prosecutors are confronted with noncitizen defendants concerned about the risks of deportation.33 This Part begins by outlining legislative and policy changes that have led to today’s unprecedented expenditure of government resources on the removal of immigrants with criminal convictions. I then explore how the Supreme Court’s decision in Padilla v. Kentucky has affected all players in the criminal justice system—criminal defense attorneys, judges, and prosecutors. The Part concludes with a focus on prosecutors, examining emerging trends among lead and trial-level prosecuting attorneys in the prosecution of noncitizen defendants.

A. IMMIGRATION PENALTIES IN STATE CRIMINAL COURT

The presence of immigration penalties in state criminal court is the product of two distinct but related trends in law and policy: first, the past twenty years’ dramatic overhaul of U.S. immigration law establishing removal as a penalty for even many minor offenses; and second, a federal immigration enforcement scheme with increasing reach and breadth that prioritizes crime-based removal.

Just over fifteen years ago, Congress remade the immigration law in a manner so significant as to usher in a new era of immigration enforcement in the United States. Two laws enacted in 1996—the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)—drastically expanded the categories of criminal conduct that trigger removal34 and just as drastically reined in the categories of noncitizens eligible to seek relief from removal in immigration proceedings.35 The

33 In Idaho and Kansas, for example, states not traditionally considered home to large immigrant communities, the Census Bureau estimates noncitizens to compromise 3.93 percent and 4.25 percent of the states’ populations, respectively. U.S. CENSUS BUREAU, 2006–2010 AMERICAN COMMUNITY SURVEY TABLE B05001 CITIZENSHIP IN THE UNITED STATES – UNITED STATES, http://factfinder2.census.gov. Across the United States, the Census Bureau estimates approximately 7.25 percent of the population to be noncitizens of the United States. US CENSUS BUREAU, 2006–2010 AMERICAN COMMUNITY SURVEY TABLE B05001 CITIZENSHIP IN THE UNITED STATES – ALL STATES, http://factfinder.census.gov.

34 The term “removal” refers inclusively to what was previously designated as the “deportation” of those within the United States as well as the “exclusion” of those seeking entry. See IIRIRA, Pub. Law No. 104-208, div. C, 110 Stat. 3009 § 304(a) (1996).
net result is a federal immigration regime that requires deportation without the possibility of relief for many minor crimes. 36

State criminal offenses that trigger mandatory deportation include, for example: a shoplifting offense with a one year suspended sentence; 37 misdemeanor possession of marijuana with the intent to sell; 38 or sale of counterfeit DVDs with a one year suspended sentence. 39 The non-mandatory criminal grounds of removal sweep even more broadly, and many noncitizens facing these grounds may still be ineligible for relief depending on individual circumstances such as the duration of residence in the United States and the degree of hardship to lawfully present family members in the case of removal. 40 For example, a lawful permanent resident convicted of one petty theft offense with no jail time is not technically subject to the mandatory grounds of deportation, 41 but is nonetheless likely to be ineligible for relief from removal if

35 AEDPA, Pub. Law No. 104-132, 110 Stat. 1214 (1996), was passed by a Congress rushing to meet the self-imposed deadline of the one year anniversary of the Oklahoma City bombing and pressured by President Bill Clinton’s public vow to toughen federal anti-terrorism laws. See Andrew George, Williams v. Immigration and Naturalization Service: Another Circuit Bows to the Antiterrorism and Effective Death Penalty Act Ban on Criminal Appeals, 8 WIDENER J. PUB. L. 85, 99–101 (1998); Roberto Suro & Stephen Barr, New Antiterrorist Funds Buy Old Tools: FBI, GSA Boost Security Forces But Congress Has Refused New Powers, WASH. POST, June 4, 1997, at A11. Despite its billing as antiterrorism legislation, the Act expanded existing categories of crime-based removal provisions were ultimately revealed as only a precursor to IIRIRA, which completely eliminated a previously common form of relief available to lawful permanent residents in removal proceedings known as “212(c) relief,” and pronounced the newly expanded “aggravated felony” as a bar to nearly all types of relief from removal. IIRIRA, Pub. Law No. 104-208 at §§ 321, 304(b). IIRIRA also, notably, expanded the definition of “conviction” and “sentence” for immigration purposes, such that some offenses not considered to be valid criminal convictions in state criminal court nonetheless constitute valid convictions for immigration purposes. See id. § 322; see also, e.g., In re Roldan-Santoyo, 221 L. Ed. 2d, 110 Stat. 1214 (1996), 519–523 (BIA 1999). For a full consideration of the impact of IIRIRA and AEDPA on the crime-based removal provisions of the Immigration and Nationality Act, see Nancy Morawetz, Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms, 113 HARV. L. REV. 1936, 1938–43 (2000).

36 Deportation is mandatory for noncitizens convicted of any offense categorized as an “aggravated felony,” as defined within the Immigration and Nationality Act, with the limited exception of certain individuals eligible for withholding of removal on the basis of a fear of return and those individuals eligible for deferral of removal under the Convention Against Torture. See, e.g., INA § 240A(a)(3), 8 U.S.C. § 1229b(a)(3) (2006) (establishing any aggravated felony as a bar to cancellation of removal); INA § 208(b)(2)(B)(i), 8 U.S.C. § 1158(b)(2)(B)(i) (2006) (establishing any aggravated felony as a bar to relief in the form of asylum); INA § 212(h); 8 U.S.C. § 1182(h) (2006) (establishing any aggravated felony as a bar to the hardship waiver commonly referred to as “212(h) relief”). See also Padilla, 130 S. Ct. at 1478 (“While other cases established a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation. The ‘drastic measure’ of deportation or removal is now virtually inevitable for a vast number of noncitizens convicted of crimes.”) (citation omitted).


40 See, e.g., INA § 240A(a), 8 U.S.C. § 1229b(a) (2006) (providing residency requirements for cancellation of removal for lawful permanent residents); INA § 212(h); 8 U.S.C. § 1182(h) (2006) (requiring “extreme hardship” to a qualifying lawfully present family member for the hardship waiver commonly referred to as “212(h) relief”).

she had not lawfully resided in the United States for five years at the time of the criminal allegations.¹²

The intensity of the federal legislature’s focus on creating and expanding crime-based grounds of removal is a relatively new phenomenon in U.S. history.⁴³ Leading up to the 1980s, the U.S. exercised its deportation power largely to remove those who violated the rules of entry and exit, not to wield a form of post-entry social control over immigrant populations.⁴⁴ But the transformation has been swift and complete, leading scholars to announce and assess the “criminalization of immigration law.”³⁵

The same national preoccupations that spurred these radical changes to the immigration laws have simultaneously led to ramped up enforcement policies explicitly targeting noncitizens with criminal convictions.⁴⁶ These preoccupations are part of a national discourse that links immigration with increased crime rates and terrorist threats.⁴⁷ This linkage, however, is not borne out by the relevant statistical data. With regard to crime, studies consistently show that foreign-born immigrants to the United States have significantly lower rates of crime and incarceration than native-born citizens.⁴⁸ The statistical variance is so striking, in fact, that there is now a body of literature hypothesizing that increased immigration may be one significant contributing factor to decreased crimes rates in the United States over the past two decades.⁴⁹ And the results of immigration

---

¹² See relevant provisions of the INA, supra note 36.


⁴⁵ Professor Stephen Legomsky teases out the various meanings implied by the term “criminalization” and identifies a generalized trend “to import criminal justice norms into a domain built upon a theory of civil regulation.” Legomsky, supra note 22, at 469. The phrase as used in a wide range of scholarship and practice refers not only to the increasingly harsh immigration penalties associated with state and federal criminal convictions, but also to the increased scope of federal prosecution of immigration-related offenses such as unlawful reentry and smuggling offenses, in addition to the drastic increase in enforcement of the crime-based grounds of removal. For a broad discussion, see id. at 476–500; Teresa A. Miller, Citizenship & Severity: Recent Immigration Reforms and the New Penology, 17 Geo. IMmig. L.J. 611, 613 (2003); Juliet Stumpf, The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power, 56 U. Chi. L. Rev. 367, 376–95 (2006). With regard to increased federal prosecution of immigration-related crime, see Ingrid Eagly, Prosecuting Immigration, 104 Nw. U. L. Rev. 1281, 1300–37 (2010).

⁴⁶ See Kanstroom, supra note 43, at 5 (examining deportation policies in light of the “recurrent episodes of xenophobia that have bedeviled our nation of immigrants.”).

⁴⁷ See, e.g., National Opinion Research Center, General Social Surveys, 1972-2006 (Cumulative File) Question 353 (2000) (reporting that 69 percent of Americans believe it “very likely” or “somewhat likely” that increased immigration will lead to higher crime rates); Eyal Press, Do Immigrants Make Us Safer?, N.Y. Times Mag., Dec. 3, 2006, at sec. 6 (describing the “conventional wisdom” that “communities with growing immigrant populations tend to be unsafe”).


⁴⁹ See, e.g., Sampson, supra note 48, at 29 (referring to immigration as “‘protective’ against violence”); Press, supra note 47.
enforcement efforts intended to target terrorist threats belie the credibility of attempts to link the two.\textsuperscript{50}

Nonetheless, policy makers have responded to this public perception\textsuperscript{51} by increasing the efficiency of deportation enforcement efforts with a sharp focus on those with current or previous involvement in the criminal justice system. While dramatically increasing the number of removals across the board,\textsuperscript{52} the Department of Homeland Security under President Barack Obama has repeatedly announced its intention to focus on the removal of those with criminal convictions.\textsuperscript{53} Over the course of the past two decades, from 1991 to 2010, the United States deported 1,309,173 people with criminal convictions.\textsuperscript{54} This represents more than sixteen times the number of people deported on the basis of criminal convictions for the preceding seventy years.\textsuperscript{55}

![Crime-based Removal by Decade 1911-2010](image)

Figure 1 Figures taken from 2010 DHS YEARBOOK tbl.38; U.S. DEP’T OF HOMELAND SECURITY, YEARBOOK OF IMMIGRATION STATISTICS: ENFORCEMENT tbl.45 (2004); and U.S. DEP’T OF HOMELAND SECURITY, YEARBOOK OF IMMIGRATION STATISTICS: ENFORCEMENT tbl.65 (2000).

Although ICE insists publicly that its enforcement resources are focused on “the worst offenders,”\textsuperscript{56} the vast majority of individuals subject to detention

\textsuperscript{50} The post-9/11 Bush administration’s “special registration” program required men from a list of predominantly Arab and Muslim countries who had entered the United States after January 2000 to register with the immigration authorities, with the stated aim of protecting the United States from the threat of Al Qaeda. See KANSTROOM, supra note 43, at 9. Thousands of men who voluntarily surrendered themselves to inspection were placed in removal proceedings, but the yield in terms of terrorism-related intelligence was close to nil. See id. at 9; Sam Dolnick, A Post-9/11 Registration Effort Ends, but Not Its Effects, N.Y. TIMES, May 31, 2011, at A18.

\textsuperscript{51} Professor Legomsky proposes that policymakers act on the basis of their own perceptions of reality as well as their perceptions of other people’s perceptions, and that recent immigration enforcement trends reveal perceived linkages between legal immigration and illegal immigration, immigration and crime, and immigration and terrorism. See Legomsky, supra note 22, at 500–10.

\textsuperscript{52} During each of his three years in office, President Obama has overseen the deportation of nearly 400,000 individuals, with more than 396,000 removals in 2011. See U.S. DEP’T OF HOMELAND SECURITY, YEARBOOK OF IMMIGRATION STATISTICS: ENFORCEMENT tbl.36 (2010) [hereinafter 2010 DHS YEARBOOK]; U.S. Immigration and Customs Enforcement, Removal Statistics, http://www.ice.gov/removal-statistics. The Obama administration has removed an average of approximately 140,000 more people annually than the George W. Bush administration. See 2010 DHS YEARBOOK, supra, at tbl.36.


\textsuperscript{54} See U.S. DEP’T OF HOMELAND SECURITY, YEARBOOK OF IMMIGRATION STATISTICS: ENFORCEMENT tbl.65 (2000); 2010 DHS YEARBOOK, supra note 53, at tbl.38.


\textsuperscript{56} See Preston, supra note 53.
and removal are minor offenders or those with no criminal record whatsoever. In 2007, Human Rights Watch reported that 64.6 percent of those immigrants deported on the basis of a criminal conviction in 2005 were deported for non-violent offenses. ICE’s own statistics reveal that its newest flagship enforcement program designed to target individuals with criminal convictions, “Secure Communities,” has failed in its stated mission; more than half of those removed under the program were convicted of misdemeanor offenses including traffic violations or had no criminal convictions whatsoever.

Amidst public debate over the mass deportations of those with only minor offenses, few voices have pointed to the problems inherent in any crime-based removal. These problems include, as explored further below in section II.B, economic and societal harms faced by communities losing parents and breadwinners to deportation. Additionally, imposing a second punishment of banishment upon those who have already served the sentence imposed on them by the criminal justice system raises questions of both fairness and proportionality, particularly when deportation follows relatively minor offenses. Finally, foreign policy concerns are implicated by a system that essentially exports convicted offenders to other less developed countries.

As a result of the convergence of the legal and policy trends discussed here, the threat of a deportable conviction for a noncitizen, regardless of status, is far from idle. While it may have been reasonable ten years ago for a long-time lawful permanent resident with a few minor convictions on her record to assume she would slip through the cracks and avoid ICE detection, her chances of doing so today are slim. Individuals with removable convictions are vulnerable to ICE

57 Forced Apart: Families Separated and Immigrants Harmed by United States Deportation Policy, 19 HUMAN RIGHTS WATCH, no.3(G), July 2007, at 42 [hereinafter Forced Apart].

58 See AMERICAN FRIENDS SERVICE COMMITTEE, PROJECT VOICE NEW ENGLAND, ET AL., RESTORING COMMUNITY: A NATIONAL COMMUNITY ADVISORY REPORT ON ICE’S FAILED ‘SECURE COMMUNITIES’ PROGRAM 5 (2011). Less than one quarter of those apprehended through Secure Communities fall within the category of individuals ICE has defined as its first priority for removal. See MARC R. ROSENBLUM & WILLIAM A. KANDEL, CONGRESSIONAL RESEARCH SERVICE, INTERIOR IMMIGRATION ENFORCEMENT: PROGRAMS TARGETING CRIMINAL ALIENS 30–31 (2011) (discussing public concerns that “jail enforcement programs are not narrowly focused on serious criminals” and analyzing Secure Communities apprehensions data according to the priority levels articulated by ICE in the Morton Memorandum, supra note 53).


60 Professor Daniel Kanstroom points out that “the propriety of our current criminal deportation laws seems so self-evident to some that much of the recent scholarly literature on the subject has focused more on critiques of the government for its alleged failure to deport enough criminal aliens than on why we have such a policy in the first place and what its constitutional and foreign policy implications are.” KANSTROOM, supra note 43, at 19.


62 See Forced Apart, supra note 57, at 54 (contrasting likely federal or state sentences for various offenses with the consequent immigration penalties to demonstrate the disproportionalit of much crime-based removal). For further discussion of proportionality as it pertains to the prosecutorial pursuit of justice, see section II.A.i below.


64 The Immigrant Defense Project (IDP) operates a hotline offering criminal-immigration analyses to criminal defense attorneys, immigrant advocates, immigrants and their loved ones. In 2011, the hotline responded to 1,800 calls. Joshua Epstein, a Staff Attorney at IDP who manages the hotline, reports that callers’ experiences confirm that ICE’s rates of targeting those with criminal convictions for enforcement have skyrocketed over the past five years. Telephone Interview with Joshua Epstein, Staff Attorney, IDP (Dec. 12, 2011).
detection upon any subsequent arrest, upon return to the United States from travel abroad, upon application for citizenship or other immigration benefits, or upon application for a renewal green card—which the law requires of lawful permanent residents every ten years.\textsuperscript{65}

The real machinery behind what has been referred to as the new “enforcement on steroids”\textsuperscript{66} is a group of rapidly expanding interior enforcement programs denounced by the ICE Agreements of Cooperation in Communities to Enhance Safety and Security (ACCESS) programs.\textsuperscript{67} ACCESS is an umbrella program that includes a variety of enforcement operations, Secure Communities among them.\textsuperscript{68} All of the ACCESS programs rely on cooperation by local law enforcement agencies to pursue their stated goals of identifying, detaining, and removing noncitizens with criminal convictions.\textsuperscript{69} These programs receive thirty times the amount of federal funding today that they received only seven years ago—a total congressional appropriation of $690 million in 2011 as compared with $23 million in 2004.\textsuperscript{70}

Once apprehended by ICE, noncitizens with removable convictions are rarely able to escape detention and, ultimately, removal. Prosecutorial discretion is seldom exercised by immigration officers at the outset of a removal case,\textsuperscript{71} and immigration judges are often legally precluded from exercising discretion over custody or removal determinations for those with criminal convictions.\textsuperscript{72} The mandatory detention provision in section 236(c) of the Immigration and Nationality Act requires detention without the possibility of bond for noncitizens


\textsuperscript{67} The nomenclature here and with regard to the “Secure Communities” program is in many ways misleading; for a discussion of the reasons why increased crime-based removals may in fact harm community safety and security, see infra section II.B.

\textsuperscript{68} The ACCESS Programs include, among others: the Criminal Alien Program, which aims to identify removable immigrants who are incarcerated within federal, state, and local facilities so as to facilitate their transfer to ICE detention and removal; the 287(g) Program, a voluntary program that in effect deputizes state and local police officers to enforce the federal immigration law, see INA § 287(g), 8 U.S.C. § 1357(g) (2006); Fugitive Operations, which targets for removal those individuals who have already been ordered removed from the United States but remain present, referred to as “fugitives” by ICE; and Secure Communities, a data-sharing program that mandates the exchange of biometric data between local and federal law enforcement agencies. See Immigration and Customs Enforcement, Fact Sheet: ICE Agreements of Cooperation in Communities to Enhance Safety and Security (ACCESS), http://www.ice.gov/news/library/factsheets/access.htm.

\textsuperscript{69} See ROSENBLUM & KANDEL, supra note 58, at 1.

\textsuperscript{70} See id.

\textsuperscript{71} ICE has recently announced several initiatives intended to encourage its agents to exercise prosecutorial discretion at all stages of enforcement, but immigrant advocates report that these policies have been implemented haphazardly if at all. See AMERICAN IMMIGRATION LAWYERS ASSOCIATION & AMERICAN IMMIGRATION COUNCIL, HOLDING DHS ACCOUNTABLE ON PROSECUTORIAL DISCRETION 5–11 (2011). The union representing ICE deportation officers announced in late 2011 it would not allow its members to participate in training on the proper use of prosecutorial discretion. See Julia Preston, Agents’ Union Delays Training On New Policy On Deportation, N.Y. TIMES, Jan. 8, 2012, at A15. A former Field Office Director for ICE’s Enforcement and Removal Operations attributed such internal resistance to pressure from above to meet goals for annual numbers of removal. See Transcript, Lost in Detention, supra note 66 (quoting Michael Rozos as stating, “Because the number 400,000 was what was agreed upon, what’s happened is you pick up whatever you can – so the low-hanging fruit, the high-hanging fruit and all the fruit that’s in between.”).

subject to the vast majority of the crime-based grounds of removal. Asserting a claim to relief from removal in immigration court while held in ICE detention is extraordinarily difficult. ICE systematically transfers individuals to remote detention facilities far from family and evidence that might support a defense to removal. Furthermore, there is no right to appointed counsel in immigration court. Despite the fact that representation is one of the most significant indicators of success in removal proceedings, approximately 60 percent of detained immigrants and 27 percent of non-detained immigrants go unrepresented. Unrepresented respondents in immigration court—even those with colorable claims to relief from removal—must navigate the “maze of hyper-technical statutes and regulations” that comprise modern immigration law, often without fluency in English.

B. REEVALUATION OF ROLES IN THE AFTERMATH OF PADILLA V. KENTUCKY

In 2010, the Supreme Court issued its landmark decision in Padilla v. Kentucky, acknowledging what immigrants and their advocates had long realized to be true: that the costs of deportation may be significantly higher for a noncitizen defendant than the costs of penal consequences such as jail time or probation. This section first presents the Court’s findings in Padilla, and then addresses the impact the decision will have on all players in the criminal justice system, focusing in particular on prosecutors.

1. Padilla v. Kentucky: Deportation as Penalty

Despite the obviously penal-like nature of deportation—banishing an individual from her home, family, and loved ones—it was long deemed a “collateral consequence” of a criminal proceeding. The import of this distinction is rooted in the “collateral consequences doctrine,” which holds that a defendant must be fully advised of the direct—but not the collateral—consequences of her crime in order for a plea to be properly and voluntarily entered. The long-held notion of deportation as a collateral consequence, however, was upended in

---

74 Nearly half of those held in ICE detention since 1998 were transferred at least once, an average distance of more than 350 miles per transfer. See Human Rights Watch, A Costly Move: Far and Frequent Transfers Impede Hearings for Immigrant Detainees in the United States 17–20 (2011). Human Rights Watch found the most common receiving jurisdiction of these transferees to be the Fifth Circuit, which has the lowest ratio in the country of available immigration lawyers to immigrants in need of representation in immigration court. See id. at 22–24.
76 See, e.g., Peter L. Markowitz, et al., Accessing Justice: The Availability and Adequacy of Counsel in Immigration Proceedings 3 (2011). Recent studies have also found that the rate of representation is even lower—24 percent—for those placed in removal proceedings through Secure Communities. Kohli et al., supra note 61, at 10.
77 See Drax v. Reno, 338 F.3d 98, 99 (2d Cir. 2003) (describing “the labyrinthine character of modern immigration law— a maze of hyper-technical statutes and regulations that engender waste, delay, and confusion for the Government and petitioners alike”).
78 Padilla, 130 S. Ct. at 1480.
79 See Peter L. Markowitz, Deportation is Different, 13 U. PA. J. CONST. L. 1299, 1300–25 (2011) (reviewing and critiquing the jurisprudence characterizing removal proceedings as civil and deportation as a “collateral consequence” of crime).
80 See, e.g., United States v. Parrino, 212 F.2d 919, 921–22 (2d Cir. 1954) (finding that, in the context of a defendant incorrectly advised by his attorney regarding the deportation consequence of a plea, the finality of a plea does not depend “upon a contemporaneous realization by the defendant of the collateral consequences thereof”). See also Markowitz, supra note 80, at 1335–37 (outlining the history of the collateral consequences doctrine as it was created by the lower courts in an attempt to determine when a plea is voluntarily entered as required by the Supreme Court in Kercheval v. United States, 274 U.S. 220, 223 (1927)).
March of 2010 with the Supreme Court’s pronouncement of deportation as a “penalty” in its own right.61

In Padilla v. Kentucky, the Court held that deportation cannot be categorized either as a collateral or direct consequence of the criminal conviction to which it is tied.62 Noting its own difficulty in “divorc[ing] the penalty from the conviction in the deportation context,” the Court stated it was confident that “noncitizen defendants facing a risk of deportation for a particular offense find it even more difficult.”63 Identifying deportation as “intimately related” to the criminal process, the Padilla Court further recognized a duty on the part of criminal defense attorneys to advise noncitizen clients regarding the deportation risks of a guilty plea.64

Before the Court in Padilla was Jose Padilla, a lawful permanent resident of the United States for more than forty years and a veteran of the Vietnam War.65 Mr. Padilla was arrested on state drug-related charges and offered a deal by the prosecution that required a plea of guilty to the transportation of “a large amount” of marijuana.66 Advised by his lawyer that “he ‘did not have to worry about immigration status since he had been in the country so long,’” he agreed and took the plea.67 His conviction, of course, fell squarely within the controlled substance grounds of removability and triggered mandatory deportation as an aggravated felony.68 The Court found that Mr. Padilla had, in fact, been entitled under the Sixth Amendment to correct advice from his criminal defense attorney regarding the deportation risks associated with his guilty plea.69

2. Padilla’s Ripples throughout the Criminal Justice System

The heart of Padilla is the obligation it places on criminal defense attorneys. And there can be no substitute for competent and thorough advice communicated from a defense attorney to her client. But a full consideration of Padilla demands an exploration of the roles and responsibilities of each of the primary players in the criminal justice system—the criminal defense attorney, the prosecutor, and the judge—when noncitizen defendants face immigration penalties.90 Two years post-Padilla, the role of the prosecutor has been the least explored among these three players despite its centrality to a noncitizen defendant’s ability to remain in the United States with her loved ones.

Following Padilla, there was and continues to be increased attention paid to the role of the criminal defense attorney when representing noncitizen clients. Padilla did not announce a new responsibility for criminal defense attorneys, but rather found that the “weight of prevailing professional norms supports the view

---

61 Padilla, 130 S. Ct. at 1481.
62 Id.
63 Id. at 1481–82. Professor Peter Markowitz argues that the Padilla decision may be understood as a “pivot point” in the Supreme Court’s immigration jurisprudence, marking an early step in a journey toward the recognition of deportation as a punishment rather than a civil penalty. Markowitz, supra note 79, at 1332.
64 Padilla, 130 S. Ct. at 1482–83.
65 Id. at 1477.
66 Id.
67 Id. at 1478.
69 Padilla, 130 S. Ct. at 1482–83.
70 See Stephanos Bibas, Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection, 99 CALIF. L. REV. 1117, 1141–42 (2011) (arguing that the Court’s recognition of the primacy of the plea bargaining process in Padilla implies an appreciation of all actors involved in the process not just as lawyers but as arbiters of justice).
that counsel must advise her client regarding the risk of deportation."91 Nonetheless, criminal defense offices across the country, particularly indigent defense services, panicked at the prospect of incorporating a wide and complex new area of law into an already overburdened practice.92 Many see Padilla’s requirements as an unfunded mandate that places an unreasonable burden on public defenders facing funding crises and overflowing dockets.93 Despite these challenges, most commentators heralded the decision as a landmark for immigrants’ rights, putting forward creative solutions to obstacles to implementation.94

Many commentators have turned to the nuts and bolts of implementing Padilla by considering best practices for bringing immigration expertise into public defense offices.95 Innovative immigration services projects are emerging in public defender offices across the country.96 At the same time, however, many areas of the country already suffering from crises in indigent defense remain light years away from considering immigration consequences as a part of day to day criminal defense practice.97 Across the board, it is clear that effective implementation will require a collaborative effort by the criminal defense bar and the immigration bar to make information and consultations on immigration consequences of criminal convictions more easily accessible.98

Padilla left some questions regarding the scope of the criminal defense attorney’s duty unanswered, and scholars, practitioners, and lower courts have begun addressing these issues. While a criminal defense attorney must, for example, advise a client regarding deportation consequences when those

91 Padilla, 130 S. Ct. at 1482. The Padilla Court analyzed Mr. Padilla’s ineffective assistance of counsel claim using the analysis created by the Court in Strickland v. Washington, first looking to whether Mr. Padilla’s attorney’s performance “fell below an objective standard of reasonableness” before turning to the question of whether his ineffectiveness prejudiced the outcome of the proceeding. See id. (following Strickland v. Washington, 466 U.S. 668 (1984)).

92 The handful of organizations across the country that were created pre-Padilla to provide support to criminal defense attorneys on questions of immigration law faced massive increases in requests for assistance in the immediate aftermath of the decision, many of them panicked. See Shanthi Prema Raghu, Supporting the Criminal Defense Bar’s Compliance With Padilla: It Begins with Conversations, 9 SEATTLE J. FOR SOC. JUST. 915, 922 and 928 (2011) [hereinafter MARKOWITZ, Protocol]; Interview with Joshua Epstein, supra note 64.

93 See, e.g., Brown, supra note 6, at 1397–1413.


96 See, e.g, McGregor Smyth, From “Collateral” to “Integral”: The Seismic Evolution of Padilla v. Kentucky and Its Impact on Penalties Beyond Deportation, 54 HOW. L.J. 795, 818 n.122 (2011) (describing the immigration services program which has existed for years at The Bronx Defenders, integrating civil legal services, including advising clients on immigration penalties and working to mitigate those punishments through criminal case strategies or civil representation, into a holistic representation model). Although The Bronx Defenders was one of the first defender offices in the country to incorporate immigration services into its practice, a growing number of offices across the country are establishing their own similar programs. See, e.g., discussion of the civil legal services program at the Knox County, Tennessee Community Law Office, http://www.pdknox.org/writeup/2 (last visited May 20, 2012). See also MARKOWITZ, PROTOCOL, supra note 95, at 12.

97 Sejal Zota, a Staff Attorney at the National Immigration Project who provides support to attorneys across the country on issues of criminal/immigration law, notes that many public defender offices—particularly those in the South where indigent defense funding is scarce—struggle to comply with Padilla’s obligations in light of ever-increasing caseloads and shrinking budgets. Interview with Sejal Zota, supra note 31.

consequences are “succinct and straightforward,” how broad is the duty to advise when the consequences are not as clear? Is the criminal defense attorney’s duty strictly limited to the deportation risks of a plea, or must she advise her client regarding the impact of the plea on eligibility to travel, to apply for citizenship, or to seek relief from removal in immigration court? Immigrant advocacy groups, unpacking the professional standards cited by the Padilla court, argue for a broad interpretation and suggest that criminal defense attorneys are duty-bound to inquire about a client’s citizenship and immigration status at the initial interview and to investigate and advise about immigration consequences of plea and sentencing alternatives. These and other questions regarding the scope and depth of defense counsel’s duties under Padilla will continue to be explored in the courts.

Padilla also raises questions regarding the role of the criminal judge presiding over a noncitizen defendant. Does the judge bear some responsibility for ensuring that the defendant is informed about the immigration consequences of a plea? If so, is it a proper function of the judge to provide this advice herself or to ensure that defense counsel has adequately done so? The decision itself does not speak to judicial obligations, but some scholars have argued that, because the decision brings immigration penalties within the ambit of the Sixth Amendment right to counsel, those penalties are now properly within a judge’s purview when monitoring the propriety of a plea.

Prior to Padilla, approximately half of the fifty states already had a statute on the books requiring judges to issue advisals regarding immigration consequences to noncitizen defendants entering a plea of guilty, and this number has subsequently increased. Judicial inquiries into immigration consequences of a plea or into counsel’s advice regarding immigration consequences demand scrutiny for various reasons. By engaging in inquiries into citizenship or

---

99 Padilla, 130 S. Ct. at 1473.
100 See Daniel Kanstroom, Padilla v. Kentucky and the Evolving Right to Deportation Counsel: Watershed or Work-in-Progress?, 45 NEW ENG. L. REV. 305, 316 (2011) (“[A]s to non-automatic, non-integral deportation consequences, the Padilla Court still did not enunciate an especially clear Sixth Amendment standard.”). Some have argued that the Court was clearer than its language might suggest, and that a lack of clarity in the immigration law with regard to the impact of a criminal offense does not impact the clarity of the defendant’s duty to advise. See, e.g., Katherine Brady & Angie Junck, How Much to Advise? What are the Requirements of Padilla v. Kentucky, DEF. IMMIGRANTS’ P’SHIP PRACTICE ADVISORY (Immigrant Legal Res. Ctr., Cal.), Apr. 20, 2010, at 3–5; Hans Meyer, Padilla v. Kentucky: The Duty of Defense Counsel Representing Noncitizen Clients, 40 MAR COLO. LAW. 37, 41–42 (2011); Lindsay C. Nash, Considering the Scope of Advisal Duties Under Padilla, 33 CARDOZO L. REV. 549, 580 (2011).
101 The decision contemplates a duty to advise regarding eligibility for discretionary relief from removal, citing to the Court’s earlier discussion in St. Cyr v. United States recognizing that the ability to seek relief might be “one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial.” Padilla, 130 S. Ct. at 1482 (citing St. Cyr v. United States, 533 U.S. 289, 323 (2001)).
103 For a full review of lower court decisions addressing the scope of the duty placed on defense attorney by Padilla, see Nash, supra note 100, at 561–70.
104 See, e.g., IDP, supra note 29, at 16–17; Vivian Chang, Where Do We Go From Here: Plea Colloquy Warnings and Immigration Consequences Post-Padilla, 45 U. MICH. J.L. REFORM 189, 207–09 (Fall 2011).
immigration status, judges run the risk of compelling disclosure of privileged attorney–client communication or violating noncitizen defendants’ Fifth Amendment right against self-incrimination.106 Apart from these legal considerations, there is the practical consideration that a nervous defendant taking a plea in front of a criminal judge will rarely be able to meaningfully process the many formalized warnings included in the plea colloquy.107 While these warnings may be administered in a way that is supportive of the spirit of Padilla, they are no replacement for meaningful advice by counsel.108

A particular challenge for judges concerned with Padilla implementation arises in states that do not provide assigned counsel for defendants accused of minor crimes that do not carry a possibility of imprisonment. This practice, condoned by the Supreme Court in Alabama v. Shelton,109 commonly results in noncitizen defendants pleading guilty to removable offenses such as petty theft or drug possession without any interaction with defense counsel.110 Professor Alice Clapman has argued that this practice violates the spirit of Padilla’s mandate that defendants not go un-counseled regarding deportation risks of pleas.111 Judges may play a role in rectifying this problem by encouraging the appointment of counsel in all cases where immigration penalties may be present.112

Working alongside defense counsel and judges are prosecutors, yet scant attention has been paid in the literature to Padilla’s impact on prosecutorial conduct. The remainder of this Article will focus on that impact, beginning with a look at that portion of the Padilla decision that directly addresses the role of the prosecutor during plea negotiations. Toward the end of the decision, Justice Stevens made a groundbreaking invitation to the defense and prosecution bars to engage with immigration penalties during the plea negotiation process:

Informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this


107 In 2010, I represented a long-time lawful permanent resident in criminal proceedings in the Brooklyn criminal court. He was entering a plea of guilty to a minor offense as part of a re-negotiated plea bargain after his earlier plea had been vacated. The client and I had spoken many times about the new plea agreement, which—unlike the vacated plea—would not trigger any of the crime-based grounds of removability. Nonetheless, during the plea colloquy the judge issued a standard warning that if my client was a noncitizen the plea might subject him to deportation. Confused, my client looked to me during the colloquy, uncertain what to do next. Based on my nod of assurance he continued the colloquy, trusting a nod from me over the judge’s standardized warning.

108 See infra section II.A.ii, examining the split in lower court decisions considering whether a generalized judicial advisal regarding deportation risks may moot out a claim that the misadvice or lack of advice by counsel regarding those deportation risks prejudiced the outcome of a proceeding.


111 See id. at 607–09.

112 Professor Clapman proposes that, in jurisdictions where counsel is not appointed for certain minor offenses, courts “issue an initial advisement to all defendants to the effect that even minor criminal charges can carry immigration consequences and to ask defendants if they would like briefly to consult with a public defender for the limited purpose of determining whether they are entitled to counsel on that basis,” removing the risk that judges will inappropriately inquire into defendants’ immigration status. Id. at 612.
process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties. As in this case, 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. At the same time, the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does.

A threshold question raised by this passage is what exactly “informed consideration” and “creative” plea bargaining on the part of the prosecution and the defense might look like. Justice Stevens notes that a well-crafted plea may avoid the defendant’s future deportation, but in practice the defense and prosecution may work together to reach many other immigration-related goals as well, including: preserving the defendant’s future ability to obtain immigration-related benefits such as a green card or citizenship; preserving the defendant’s eligibility to seek relief in immigration court if she already is deportable or will become so subsequent to the plea; preserving the defendant’s ability to travel internationally without facing detention and removal proceedings upon return; and avoiding mandatory detention if the defendant anticipates being taken into ICE custody.

There are various ways in which the prosecution and defense may shape a plea agreement to achieve one or more of these immigration-related goals. First, the prosecutor may offer a plea under a different criminal statute of a similar nature and severity to the originally charged offense. A lawful permanent resident charged with misdemeanor intentional assault, for example, might be able to preserve her lawful immigration status by pleading guilty to misdemeanor simple assault, an offense of commensurate gravity to the charged offense that would not constitute a crime involving moral turpitude. In some cases, the defendant may be unable to avoid removability and may seek simply to preserve her day in immigration court by crafting a plea that does not preclude eligibility for relief from removal. While a guilty plea to almost any controlled substance-related offense, for example, will trigger the grounds of removability for a lawful permanent resident, many defendants may preserve eligibility for relief from removal by pleading guilty to an offense that does not include sale or intent to sell as an element.

Second, the prosecutor may alter the sentencing component of the plea offer. A sentence of 364 days rather than 365 days on certain offenses,

113 Padilla, 130 S. Ct. at 1486.

114 See In re Solon, 24 I. & N. Dec. 239, 244–45 (B.I.A. 2007) (finding the offense of intentional assault as provided in NY Penal Law §120.00(1) (McKinney 2009), in contrast with a “simple assault” offense, to constitute a crime involving moral turpitude).

115 Again using the New York Penal Code as an example, a lawful permanent resident who pleads guilty to NY Penal Law § 220.16(1) (McKinney 2008), possession of a controlled substance in the third degree with the intent to sell, will face mandatory deportation under the drug trafficking aggravated felony ground of removal. See, e.g., In re Aracena, No. 043 623 368, 2010 WL 2224543 (B.I.A. May 6, 2010). However, a guilty plea to NY Penal Law § 220.16(12) (McKinney 2008)—a different subsection of the very same offense that criminalizes weight-based possession of a controlled substance without requiring intent to sell as an element—would trigger the controlled substance ground of deportability but not the drug trafficking aggravated felony ground, preserving the defendant’s eligibility for cancellation of removal if she met the relevant residency requirements. See INA § 237(a)(2)(B), 8 U.S.C. § 1227(a)(2)(B) (2006); INA § 240A(a), 8 U.S.C. § 1229b(a) (2006).
example, will avoid triggering the aggravated felony grounds of removal.116 Also related to sentencing, prosecutors may work with defense counsel to ensure that noncitizen defendants are able to access court-sponsored treatment programs. Noncitizen defendants are often precluded from participation in treatment programs either because of the presence of an immigration detainer117 or because a guilty plea is required prior to participation, triggering irreversible deportation consequences.118 Prosecutors may be able to facilitate a noncitizen defendant’s access to court-sponsored treatment by joining in defense counsel’s request to ICE to lift an immigration detainer119 or consenting to diversion to treatment prior to the entry of a guilty plea.

Third and finally, the prosecutor may modify the language included in documents in the court file that pertain to the criminal charges, conviction or sentencing, so as to protect the defendant should she one day face removal proceedings.120 The language included in these documents is often highly relevant to subsequent determinations of removability because immigration judges are given significant leeway to look behind the statute of conviction when determining whether a conviction falls within certain criminal grounds of removability.121 For example, when a noncitizen has been convicted of an offense involving fraud as an element, the immigration adjudicator may look to any relevant evidence to determine whether the alleged amount of loss to the victim

116 Many but not all of the enumerated offenses that trigger the aggravated felony grounds of removal require the imposition of a sentence of one year or more. See INA § 101(a)(43), 8 U.S.C. § 1101(a)(43) (2006).
117 See PAROMITA SHAH, NATIONAL IMMIGRATION PROJECT, UNDERSTANDING IMMIGRATION DETAINERS: AN OVERVIEW FOR STATE DEFENSE COUNSEL at 25–26 (2001) (“Immigration detainers interfere with courts’ discretion to impose and supervise individualized sentencing alternatives for noncitizens.”).
118 In many states, diversion-to-treatment programs require that a guilty plea be entered prior to diversion with the understanding that the plea will be vacated or withdrawn if the defendant successfully completes the program’s requirements. See, e.g., NEW YORK CITY BAR COMMITTEE ON CRIMINAL JUSTICE OPERATIONS, THE IMMIGRATION CONSEQUENCES OF DEFERRED ADJUDICATION PROGRAMS IN NEW YORK CITY 2 (2007) [hereinafter IMMIGRATION CONSEQUENCES] (reporting on the regular practice of New York City’s problem solving courts to require a guilty plea before participation in treatment). However, the definition of “conviction” in the Immigration and Nationality Act has been defined so broadly that such a withdrawn plea—although no longer valid in state criminal court—remains a conviction for immigration purposes. See INA § 101(a)(48)(A); 8 U.S.C. § 1101(a)(48) (2006); see also IMMIGRATION CONSEQUENCES, supra, at 3.
119 See, e.g., NEW YORK CITY BAR COMMITTEE ON CRIMINAL JUSTICE OPERATIONS, IMMIGRATION DETAINERS NEED NOT BAR ACCESS TO JAIL, DIVERSION PROGRAMS 6 (2009) [hereinafter NEW YORK CITY BAR, IMMIGRATION DETAINERS] (recommending that judges, prosecutors, defense attorneys and service providers work together to provide information to ICE requesting that detainers be lifted where necessary for defendants to participate in diversion to treatment programs).
120 Determinations of removability in immigration court have long been governed by the categorical approach, which limits the evidence the immigration judge may consider to the statute of conviction. See, e.g., In re Pichardo-Sufren, 21 I. & N. Dec. 330, 335–36 (B.I.A. 1996); Gonzales v. Duenas-Alvarez, 549 U.S. 183, 186–87 (2007). Where the statute of conviction is “divisible,” in that it may either support or preclude a finding of removability, the court may examine documents included in the record of conviction, pursuant to the “modified categorical approach.” See Duenas-Alvarez, 549 U.S. at 187; In re Lanferman, 25 I. & N. Dec. 721, 724 (B.I.A. 2012). The “record of conviction” is defined to include the charging document, plea agreement, plea colloquy, and record of conviction. See Lanferman, 25 I. & N. Dec. at 723 n.1. In some cases, the immigration court may look even more broadly than the record of conviction. In In re Silva-Trevino, the Attorney General significantly eroded the categorical approach by holding that in some cases immigration judges may look to any relevant evidence when determining whether an offense constitutes a crime involving moral turpitude. 24 I. & N. Dec. 687, 704 (B.I.A. 2008) (no longer good law in three circuits, see Prudencio v. Holder, 669 F.3d 472, 476–82 (4th Cir. 2012); Fajardo v. U.S. Att’y General, 659 F.3d 1303, 1310 & n.8 (11th Cir. 2011); Jean-Louis v. Att’y General of the U.S., 582 F.3d 462, 470 (3d Cir. 2009)). The United States Supreme Court has also held that the categorical approach does not apply when the immigration judge is analyzing a “circumstance specific” element of a ground of removability such as the amount of loss to the victim required to trigger the fraud aggravated felony ground. See Nijhawan v. Holder, 129 S. Ct. 2294, 2300–02 (2009).
exceeded $10,000, rendering it sufficient to trigger the fraud-related aggravated felony grounds of removal.\textsuperscript{122} Modifying sentencing documents to reflect a loss to the victim of less than $10,000 might protect the noncitizen defendant from an aggravated felony charge in immigration court or provide her with a defense to such a charge.

The limited public discourse on this issue reveals that practitioners and scholars vary in the extent to which they approve of the notion of state prosecutors engaging with immigration issues during plea negotiations, despite Justice Stevens’s overt endorsement.\textsuperscript{123} One view, as expressed by Professor Stephanos Bibas and endorsed in this Article, is that the Padilla decision not only sanctions the prosecutor’s engagement with these issues but encourages it.\textsuperscript{124} Others have questioned the propriety of this engagement; Professor Daniel Kanstroom, for example, has applauded the Court for “bringing out into the open the post-entry social control function of deportation,” but wonders whether it is appropriate for state prosecutors to “use deportation for leverage in criminal cases.”\textsuperscript{125}

C. EMERGING TRENDS AMONG STATE PROSECUTORS IN THE PROSECUTION OF NONCITIZEN DEFENDANTS

Padilla has opened the door for prosecutors, like defense attorneys, to reevaluate the scope and nature of their role when prosecuting noncitizens. It is difficult to know the extent to which state prosecutors have begun to engage in this evaluative process, either at a policy level or at the level of individual practice. In this section, I begin by canvassing office-wide public statements and policies issued by prosecutors. I then attempt to look behind these policy pronouncements to understand the attitudes and practices of “line prosecutors” who are in criminal court litigating cases on a day to day basis.

1. Office-wide Policies

Public office-wide statements and policies on this issue are few and far between, even post-Padilla. As far as I have been able to document, only one state prosecutor office nationwide—the Office of the District Attorney of Santa Clara County, California—has adopted a written policy that addresses the consideration of immigration consequences during plea bargaining.\textsuperscript{126} This policy

\textsuperscript{122} See Nijhawan, 129 S. Ct. at 2301–02 (interpreting the fraud-related aggravated felony provisions at INA § 101(a)(43)(M)(i); 8 U.S.C. § 1101(a)(43)(M)(i)).

\textsuperscript{123} See, e.g., NEW YORK CITY BAR ASSOCIATION, PADILLA V. KENTUCKY: THE NEW YORK CITY CRIMINAL COURT SYSTEM, ONE YEAR LATER, A REPORT OF THE CRIMINAL COURTS AND THE CRIMINAL JUSTICE OPERATIONS COMMITTEES OF THE NEW YORK CITY BAR ASSOCIATION 9 (2011) (hereinafter NEW YORK CITY BAR, ONE YEAR LATER) ("[N]o consensus has been reached as to whether District Attorney’s offices or judges must or should play any role in addressing immigration consequences, other than to encourage defendants to speak with defense counsel. These issues should be revisited in the future and steps should be taken to ensure and promote best practices.").

\textsuperscript{124} See Bibas, supra note 90, at 1145–46. Robert Johnson, former President of the National District Attorney’s Association, has encouraged prosecutors to consider immigration consequences for many years, and sees Padilla as a clear recognition of this principle that “should influence a prosecutor’s views.” Robert M.A. Johnson, A Prosecutor’s Expanded Consequences Under Padilla, 31 ST. LOUIS PUB. L. REV. 129 (forthcoming 2011).

\textsuperscript{125} See Kanstroom, supra note 100, at 319. For an analysis of the preemption concerns Professor Kanstroom suggests may be raised by Stevens’s analysis, see infra section II.C.i.

\textsuperscript{126} See Memorandum from Jeff Rosen, District Attorney, to Fellow Prosecutors, on Collateral Consequences (Sept. 14, 2011) (on file with author) [hereinafter Rosen Memo]. The Los Angeles District Attorney’s Office issued a Special Directive in 2003 providing its prosecutors with the authority to deviate from the office’s case-settlement policy “[w]hen collateral consequences will have so great an adverse impact on a defendant that the resulting ‘punishment’ will be disproportionate to the punishment other defendants would receive for the same crime.” Los Angeles County District Attorney’s Office, Special Directive 03-04: Collateral Consequences, Sept. 25, 2003, http://da.co.la.ca.us/sd03-04.htm [hereinafter Los Angeles County Special
cites Padilla to support “a dominant view that the appropriate consideration of collateral consequences is central to the pursuit of justice.” The policy instructs Santa Clara County prosecutors that it is not only appropriate but incumbent upon them to take “reasonable steps to mitigate . . . collateral consequences” when those consequences “are significantly greater than the punishment for the crime itself.” Specifically with regard to immigration penalties, the policy urges prosecutors to consider alternative plea agreements that will avoid unjust outcomes, which are most likely to arise when the charged offense and corresponding sentence are less serious and disproportionate to the immigration risks.

The Santa Clara policy was adopted by newly elected District Attorney Jeffrey Rosen after a bruising election campaign against the incumbent District Attorney Dolores Carr. During the campaign, it was revealed that Carr had personally arranged for a reduction in charges brought against an international student at Stanford University whose attorney was a contributor to the Carr campaign in order to avoid the student’s deportation. The arrangement flew in the face of public vows by Carr that her office would never alter pleas for immigration-related reasons. Carr subsequently defended herself to the press, stating, “We strive for justice, and the result in this case was entirely just.” Once in office, Rosen realized it was time for a new policy and undertook a thorough evaluative process, engaging with community members and his own staff. The resulting policy, at its core, normalizes the consideration of immigration penalties, granting line prosecutors the inherent authority to weigh immigration penalties during plea negotiations without requiring a deviation from normal policy or permission from above.

The model policy instructs prosecutors to “attempt, considering adopting a policy similar in kind. The model policy instructs prosecutors to "attempt,

---

127 This document refers to immigration-related consequences as “collateral consequences” despite the finding in Padilla that these consequences are not collateral, but penalties closely tied to the criminal process. See Padilla, 130 S. Ct. at 1460.

128 Rosen Memo, supra note 126, at 4.

129 Id. at 2.

130 Id. at 4–5.


134 See Kaplan, supra note 132.

135 Telephone Interview with David Angel, Special Assistant District Attorney, Office of the District Attorney of Santa Clara (Jan. 27, 2012). My thanks to Mr. Angel, who was instrumental in the creation and drafting of the Santa Clara policy, for his thoughts.

136 See Rosen Memo, supra note 126, at 4–5; Interview with David Angel, supra note 135.

137 Interview with David Angel, supra note 135.

The results of this survey are necessarily limited by its modest distribution, and Brooklyn respondents likely possess significantly more positive perceptions of immigrants than the country as a whole. This is the case, first, because of basic demographics—Brooklyn is a heavily “blue” county that votes wherever possible and appropriate, to agree to immigration neutral pleas and sentences which do not have adverse immigration consequences.\footnote{See further discussion of the problems inherent in blanket prosecutorial advisals below in section II.A.ii.}

A handful of offices have responded to Padilla by creating a standard notification to be distributed to all defendants warning of the potential deportation risks of any conviction for any noncitizen defendant. This type of blanket notification is currently being used, for example, in New York City by the offices of the New York County District Attorney, the Queens County District Attorney, and the Office of the Special Narcotics Prosecutor.\footnote{For a history of the evolution of the American prosecutor from “a minor actor in the court’s structure” to “almost limitless power,” see Worrall, supra note 16, at 8–9.} Quite apart from the individualized approach embraced by the Santa Clara policy, these blanket prosecutorial notices may do more harm than good by attempting to simplify what is a varied and complex interaction between criminal state statutes and immigration penalties.\footnote{According to Dino Amoroso, Deputy District Attorney in the Kings County District Attorney’s Office, 531 prosecutors were employed by the Kings County District Attorney’s office as of January 2012 when the survey was distributed. Of this number, approximately 65 were recent hires who had not yet begun practicing, and another approximately 65 were in the midst of training and had not yet begun practicing in criminal court. This leaves a universe of approximately 401 employees of the office eligible to respond to the survey. The results of the survey are limited given the response rate, which is lower than would be ideal, and the possibility of self-selection bias among respondents.}

2. Attitudes and Practices of Trial-level Prosecutors

Regardless of larger policy determinations, individual trial-level prosecutors have wide discretion to make charging and plea decisions.\footnote{Interview with Marianne Yang, supra note 31. See also NEW YORK CITY BAR, ONE YEAR LATER, supra note 123, at 6. The notification form used in New York and Queens Counties is on file with the author. Ann Benson at the Washington Defender Association reports a variation on this practice in Snohomish County, Washington, where the Prosecuting Attorney’s Office temporarily amended the standard plea form signed by all defendants entering into a plea agreement to confirm that the defendant had been advised by her attorney of any immigration consequences. After local defenders expressed grave discomfort with having their clients sign such a waiver, the amendment was removed. Interview with Ann Benson, supra note 31.} As a starting point for canvassing the views of these trial-level prosecutors, I partnered with the Kings County (Brooklyn), New York District Attorney’s Office in distributing a survey entitled, “The Role of the Prosecutor: Immigration Consequences and Plea Bargaining.” The survey was distributed via an online link to trial-level prosecutors within the Kings County Office in January 2012 and consisted of ten questions regarding the role of the prosecutor with regard to immigration consequences during the plea bargaining phase of a case. Of approximately 400 attorneys who received the survey and were actively prosecuting cases in criminal court, 185 responded.\footnote{Id. at 1. For further discussion of the ILRC model policy, see Part III below.} Respondents to the Kings County survey have more opportunity than many to consider the issues raised by the survey questions, because the most recent census data indicates that 16.7 percent of all Brooklyn residents are noncitizens.\footnote{U.S. CENSUS BUREAU, 2006-2010 AMERICAN COMMUNITY SURVEY TABLE B05001 CITIZENSHIP IN THE UNITED STATES—KINGS COUNTY, NEW YORK, http://factfinder.census.gov.}

The Georgetown Law Journal, Volume 101.1, November 2012*

See further discussion of the problems inherent in blanket prosecutorial advisals below in section II.A.ii.
overwhelmingly democratic, and research shows this to be a reliable indicator of pro-immigrant views. Furthermore, although the Kings County District Attorney’s Office does not have a formal public policy on the question of immigration consequences, Kings County District Attorney Charles Hynes is widely recognized as one of the most progressive elected prosecutors in the country, and high-level officials in his office have gone on record in support of the consideration of immigration penalties during plea bargaining.

Notably, the survey responses revealed attitudes toward the consideration of immigration penalties that were generally more positive than the respondents’ reported corresponding practice. Just over half of respondents—53 percent—agreed with the statement, “It is appropriate, in some circumstances, to alter a plea offer to mitigate negative immigration consequences.” Twenty-five percent disagreed or strongly disagreed.

![Chart](chart.png)

Figure 2.

Though more than half of respondents believe it appropriate to alter pleas in some circumstances, less than half actually translate this belief into practice with any frequency. When asked how often they alter a plea offer because of immigration consequences when prosecuting cases where the defendant might face such consequences, a total of 46 percent of respondents indicated they “rarely” or “never” do so. Forty-eight percent responded that they “sometimes” or “often” alter a plea offer for this purpose.

---


147 The Pew Research Center has confirmed through empirical study that residents of “blue” counties typically harbor far more positive attitudes toward immigrants than residents of “red” counties. See Carroll Doherty, Pew Research Center, Attitudes Toward Immigration in Red and Blue (2006).


149 In December 2010, for example, District Attorney Hynes’s counsel, Lance Ogiste, told the New York Law Journal that the District Attorney was “very much aware” that unwarranted deportations can have an “enormous” adverse impact upon families, and that, in cases where a noncitizen defendant does not pose a danger to the community, “if we can work out a disposition that will not affect the defendant’s immigration status, we will definitely do it.” Tony Mauro & Daniel Wise, ABA to Study Changing Role of Criminal Defense Lawyers Post-‘Padilla’, New York Law Journal (Online), Dec. 27, 2010.
Respondents were also asked to consider a list of possible factors that might weigh in their decision whether to alter a plea in order to mitigate immigration penalties. Respondents, on average, identified factors that are directly connected to the criminal charges or the defendant’s criminal record as weighing much more heavily than those factors relating to the defendant’s immigration status and the hardship posed by immigration-related penalties. Respondents identified the defendant’s criminal record and the severity of the charged offense as the two most relevant factors when determining whether to alter a plea, followed by the availability of an alternative plea to an offense of a similar nature or similar severity. Considerations pertaining to hardship to the defendant or her family should she face deportation followed significantly behind.

Respondents were given an opportunity at the end of the survey to provide any additional thoughts regarding “the proper role of the prosecutor during plea bargaining with regard to immigration consequences of charged offenses.” By far the most common theme among the responses to this open-ended question was the
respondents’ embrace of the pursuit of justice as the overarching prosecutorial goal. Indeed, twenty-one respondents mentioned the pursuit of “justice” or a “just” outcome in their answer to this question. Yet, not surprisingly, respondents differed in their perceptions of what constitutes justice. Twelve of the respondents who included an answer to this open-ended question expressed distaste for the consideration of immigration consequences during plea negotiations because it contradicted their perceptions of fairness and equity. Another five voiced concern that decisions affecting immigration should be left entirely to the federal government. Sixteen respondents described a perception of justice that focused on the protection of community and/or victim safety.

When asked to specify the source of their knowledge of the immigration consequences of the crimes they prosecute, respondents indicated a heavy reliance on their own research and previous work experience as opposed to more formal sources of training. Presented with various possible sources of knowledge, twenty-eight respondents selected “other” and explained that their knowledge of these issues stems from informal experience and conversations on the job. A relatively small number of respondents—between 10 and 25 percent—indicated that they rely on formal trainings or written or online materials provided by their own office or external agencies.

Overall, the results of the survey reveal a significant variety of practices and perceptions among prosecutors, even in a largely liberal county and an office where the leadership is supportive of positive engagement with immigration penalties. Despite Justice Stevens’s invitation to the prosecution bar to consider immigration penalties during plea negotiations, many prosecutors remain uncertain or, in some cases, entirely unconvinced, as to the propriety of doing so.

II. SERVING STATE INTERESTS THROUGH INFORMED CONSIDERATION OF IMMIGRATION PENALTIES

In Padilla, Justice Stevens stated without much ado or discussion that the “informed consideration of possible deportation” during plea bargaining furthers the interests not only of defense counsel but of the prosecution. This Part looks behind Justice Stevens’s statement, examining informed consideration of immigration penalties in light of prosecutorial goals and interests.

Determining what constitutes the most fundamental of prosecutorial goals is not a simple task. The role of the local prosecutor has changed drastically

---

150 Respondent number 34, for example, stated, “I strongly disagree that a deportable [sic] defendant should be punished any less stringently than a citizen defendant—that would be ludicrously misguided.” For a detailed discussion of concepts of equity as implicated by alternative plea offers, see infra section II.A.i.

151 Respondent number 8, for example, stated, “Federal Government officials … are charged with enactment and enforcement of immigration law. Reform should be sought in that venue.” For a discussion of the ethical and professional propriety of prosecutors engaging with federal immigration penalties during plea negotiations, see infra section II.C.ii.

152 Respondent number 32, for example, stated: “Immigration consequences can be one of many factors to consider when striving to reach a result that would achieve justice. However, the prosecutor is not in the business [sic] of immigration policy and should only consider the consequences in terms of achieving a just result for the community at large.”

153 The two most commonly cited sources of knowledge of the immigration consequences of New York state offenses by Kings County respondents were “my own research,” cited by 45 percent of respondents, and “previous work experience,” cited by 44 percent of respondents.

154 Respondent number 66, for example, wrote in that his knowledge is “based on issues raised in various cases over the years.”

155 Padilla, 130 S. Ct. at 1486.

156 M. Elaine Nugent-Borakove has compiled a history of attempts to create prosecution goals and objectives, noting that until the 1960s such goals were merely descriptive, for example, the enforcement of laws and the prosecution of criminals. See M. Elaine Nugent-Borakove, Performance Measures and Accountability, in THE CHANGING ROLE OF THE AMERICAN PROSECUTOR, supra note 16, at 93–97.
over the past century. Changes include the vastly increased discretion now available to individual prosecutors at nearly every stage of a criminal case, as well as a movement by prosecuting offices toward greater openness within their communities, usually referred to as “community prosecution.”

Beginning in 2003, the APRI—the research and development arm of the National District Attorneys Association—undertook a five-year long “Prosecution Performance Measurement Project,” in conjunction with a working group of prosecutors, scholars, researchers, and government officials in an effort to develop and implement a system of performance measures for prosecutors. The working group began with the recognition that conviction rates, crime rates, and recidivism rates—the most commonly identified measures of prosecutorial success—insufficiently reflect the varied outcomes sought by the modern prosecutor. As an alternative, the group sought to identify measurable outcomes that would accurately gauge prosecutors’ success in pursuing justice, defined to include “addressing a host of community desires and needs, decreasing citizen fear of crime, improving quality of life for community residents, and resolving problems by means other than just criminal prosecution.”

Ultimately, the group expressed the mission of the local prosecutor as follows: “Through leadership, the local prosecutor ensures that justice is done in a fair, effective, and efficient manner.” In parsing this mission, the group created a matrix (hereinafter the APRI matrix) that identifies the following three broad prosecutorial goals: 1) to promote the fair, impartial, and expeditious pursuit of justice; 2) to ensure safer communities; and 3) to promote integrity in the prosecution profession and coordination in the criminal justice system. Within the matrix, each of the three goals is broken down into several quantifiable outcomes and performance measures that are reflective of the broader goal.

The APRI matrix provides a useful lens for examining how the consideration of immigration penalties of criminal convictions affects prosecutorial goals. This Part addresses each of the three goals within the APRI matrix, examining how prosecutorial engagement with immigration penalties of crimes might affect outcomes identified with each.

A. THE PURSUIT OF JUSTICE

The first goal identified in the APRI matrix is “to promote the fair, impartial, and expeditious pursuit of justice.” There are, of course, few notions as open to individual interpretation as the generalized pursuit of justice. The

---

157 See Worrall, supra note 16, at 18–23.
159 See id. at 443–44.
161 DILLINGHAM ET AL., supra note 32, at 1.
162 Id. at 3.
163 Id. at 5.
164 Id. at 6. See also Budzilowicz, supra note 160, at 29–31.
165 DILLINGHAM ET AL., supra note 32, at 6–7.
166 See DILLINGHAM ET AL., supra note 32, at 6.
167 Robert Johnson, former President of the National District Attorney’s Association, shared with me the results of an exercise he has conducted that reveals how significantly prosecutors vary in their perceptions of what constitutes justice. In this exercise, which Mr. Johnson conducted on four occasions with different gatherings of local prosecutors, he outlined for the group one fact pattern involving a defendant accused of a particular crime involving a particular victim. More often than not, he says, the group came back with a remarkably varied set of proposals for what would constitute a “just” plea offer given this identical set of facts. Telephone Interview with Robert M.A. Johnson, former District Attorney of Anoka County, Minnesota and former President of the National District Attorneys Association (Aug. 22, 2011).
*Forthcoming in The Georgetown Law Journal, Volume 101.1, November 2012*

wording of this first goal, however, suggests two different prisms through which to consider the prosecutorial pursuit of justice—first, the promotion of ideals of equity, such as fairness and impartiality; and second, the promotion of expediency. This section addresses each in turn.

1. Negotiating Fair and Proportionate Outcomes

Understanding how the prosecution of noncitizen defendants implicates fairness and impartiality is vital because prosecutors perceive the interplay quite differently. Many prosecutors believe it is unfair or unjust to extend a plea offer to a noncitizen defendant that is in any way modified from what she would extend to a citizen defendant.166 Twelve respondents to the Kings County survey expressed the opinion, in response to an open-ended question about the role of the prosecutor, that it was unfair to offer a noncitizen a plea deal that differed in any way from what they would offer a similarly situated citizen; many of the respondents suggested this would be favoring noncitizens over citizens.167 One experienced Brooklyn prosecutor, for example, stated: “My primary concern is to be fair while ensuring the public safety of my constituents. I try to be as consistent as possible in plea bargaining, and will not usually cut a similarly situated defendant a break just because he has immigration issues.”170

But this perception of fairness is flawed in that it evaluates the equity of a plea based on the individual components of the deal instead of the totality of its outcome. First, in many cases the prosecution and the defense may be able to settle upon a modified plea that is similar in nature and severity to the plea the prosecution would have sought in the absence of immigration penalties.171 In circumstances where the only appropriate alternative offense is less severe than the originally charged offense, the defense and prosecution may agree upon a more severe sentence. As Carlos’s story demonstrates, a noncitizen defendant is very likely to be willing to serve more time in jail or perform more days of community service than she otherwise would have in order to avoid the risk of deportation. An alternative plea, therefore, is not necessarily a lesser plea.

Furthermore, in the vast majority of cases, a noncitizen defendant will be treated more harshly because of her immigration status if given the same

---

166 Practitioners providing technical support on immigration law to criminal defense attorneys report that this is the most common response of state prosecutors when defense attorneys seek immigration-neutral alternative plea offers. Interview with Raha Jorjani, supra note 31; Interview with Manuel Vargas, supra note 31; Interview with Ann Benson, supra note 31.

167 Several survey respondents expressing this belief seemed to mistakenly assume that all noncitizen defendants are present in the United States without authorization. Respondent number 2, for example, stated, “I also do not like treating someone differently b/c they have immigration issue [sic]—they should get the same plea for the most part that the US Citizen is getting and not something better b/c they are here illegally.” This assumption ignores the fact that all noncitizens—including lawful permanent residents, asylees, refugees, and those here in valid non-immigrant status—are subject to either the criminal grounds of deportability or the criminal grounds of inadmissibility. See INA § 237(a)(2), 8 U.S.C. § 1227(a)(2) (2006); INA § 212(a)(2), 8 U.S.C. § 1182(a)(2) (2006). In fact, the outcome of a criminal charge is generally more dispositive for a lawfully present immigrant than an unlawfully present one because noncitizens who are present in the United States without authorization are already subject to removal simply on the basis of their unlawful presence. See INA § 237(a)(1); 8 U.S.C. § 1227(a)(1) (2006).

168 This respondent is identified as respondent number 3 and has served in the Kings County District Attorney’s office for more than twenty-one years. Another respondent, identified as respondent number 30, stated simply: “Why should a non-US citizen be offered a more lenient plea than a US citizen? Ludicrous.”

169 For examples of common alternative pleas that are commensurate in nature to originally charged offenses, see supra section I.B.ii. Indeed, in some cases noncitizen defendants will agree to a plea that entails both a harsher charge and a harsher sentence than she would have otherwise received in order to minimize immigration penalties. Angie Junck, Staff Attorney, Immigrant Legal Resource Center, recalls a client who was charged with the misdemeanor offense of violating an order of protection and offered a plea to the misdemeanor with minimal jail time. Because this plea would have triggered mandatory deportation, he pled guilty to felony witness dissuasion, a predicate strike under California’s three-strikes law, with a sentence of 364 days in jail in order to preserve his eligibility for relief in removal proceedings. Interview with Angie Junck, supra note 31.
treatment as a similarly situated citizen. Again, Carlos’s story illustrates this reality. For a United States citizen defendant in Carlos’s shoes, the plea originally offered by the prosecution would have resulted in several unpleasant days in jail before returning home to friends and family. For Carlos, however, it would have resulted in those same several unpleasant days followed by permanent banishment from the home he had known since the age of three and life-long separation from his two United States-born daughters. The former head of the National District Attorneys Association (NDAA), Robert Johnson, considers the quest for proportionality in plea outcomes to be a necessary part of the prosecutor’s duty to pursue justice. During his time at the helm of the NDAA, he called upon prosecutors to consider all consequences flowing from a conviction, stating, “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 . . . . As a prosecutor, you must comprehend this full range of consequences that flow from a crucial conviction. If not, we will suffer the disrespect and lose the confidence of the very society we seek to protect.”

Mr. Johnson’s proposal is by no means revolutionary. In fact, prosecutors regularly consider non-criminal consequences of convictions during plea bargaining—ranging from the defendant’s eligibility for public housing to voting rights to licensing restrictions. Myriad examples demonstrate just how commonly prosecutors exercise their discretion through charging or plea decisions in order to avoid collateral consequences of convictions with the purpose of achieving just and proportionate outcomes. One respondent to the Kings County survey noted the regularity with which he and his colleagues consider non-criminal consequences of offenses, stating, “deportation has to be considered [sic] by the prosecutor as any other collateral consequence would be

---

172 The Introduction to this Article includes a more detailed discussion of how Carlos’s story would have played out had he pled to a deportable offense.

173 Immediately upon arrival in the Dominican Republic, deportees from the United States are held for questioning by representatives of the Dominican Department of Deportees; they are then processed and given identity documents clearly identifying them as “deportees.” See BROTHERTON & BARRIOS, supra note 14, at 189–92. Dominican deportees are heavily stigmatized, routinely targeted for arbitrary police sweeps and investigations, and often unable to find work because of their deportee status. See id. at 190–209. See also Deepa Fernandes & Abdulai Bah, Deported and Forgotten: Is the U.S. Government Responsible for the Fate of Deportees it Brands as Criminals?, THE NATION, Feb. 20, 2012 (reporting on the harsh treatment, routine jailing and stigmatization of deportees from the United States in countries including Liberia, Haiti, El Salvador, Nigeria, and the Dominican Republic).

174 See DILLINGHAM ET AL., supra note 32, at 1, 9 (“The criminal justice system is expected not only to produce practical results in the form of reduced crime and enhanced security, but also to achieve justice in society by holding offenders accountable and applying the force of the law proportionately and fairly.”). See also FORCED APART, supra note 57, at 52–56 (addressing the international law principle of proportionality as applied to crime-based removal).


176 Id.


178 See, e.g., United States v. Gonzalez, 58 F.3d 459, 460 (9th Cir. 1995) (finding the actions of the U.S. Attorney not only “entirely proper and appropriate,” but in line with the duty of the federal prosecutor “not simply to prosecute, but to do justice” where he sought leave to dismiss one of three counts under which Mr. Gonzalez had been indicted in part because a conviction under the count would trigger Mr. Gonzalez’s deportation) (emphasis removed).
considered e.g., violation of parole or probation, revocation of a driver’s license, etc.179 Studies show that prosecutors working in jurisdictions with repeat-serious-offender laws (often referred to as “three strikes” laws) are almost twice as likely to exercise their discretion to charge three-strikes arrestees with lesser offenses than they would otherwise have charged so as to avoid triggering mandatory minimum sentences.180 And the Los Angeles County District Attorney’s Office acknowledged nearly ten years ago that it is appropriate for prosecutors to offer alternative case settlements “when collateral consequences will have so great an adverse impact on a defendant that the resulting ‘punishment’ will be disproportionate to the punishment other defendants would receive for the same crime.”181

Furthermore, prosecutors and defense attorneys engaging in plea negotiations regularly trade in procedural mechanisms that were created principally to protect defendants from so-called collateral consequences. Intermittent sentencing, for example, is a sentencing posture allowed in many states that permits defendants to serve their sentence of incarceration only on certain days of the week, such as weekends, so as to avoid loss of employment.182 In New York State, intermittent sentencing has been permitted since 1970183 and was created to allow “petty offenders to remain in the community during working hours” such that “penal sanctions in such cases no longer would be responsible for unwanted side effects.”184 It is regularly used as a chip during plea negotiations.185 Another often bargained for disposition that was created to mitigate negative collateral consequences of a conviction is the plea of nolo contendere, or “no contest,” which protects the defendant against the conviction being used in a subsequent civil or criminal case.186 More than sixty years ago, the Georgia courts acknowledged the plea of nolo contendere as an appropriate remedy for the disparate impact a conviction might have on different individuals, including the inability to hold public office, vote, or serve on juries.187

As these many examples show, the use of alternative pleas to mitigate the negative collateral consequences of a criminal conviction is neither new nor particularly controversial. And in Padilla, the Supreme Court elevated immigration penalties above these collateral consequences, identifying them as “penalties” that are part and parcel of the criminal process.188 Prosecutors willing to consider immigration penalties during plea negotiations and modify pleas accordingly are not favoring noncitizens over citizens, they are merely

---

179 This respondent is identified as respondent number 44.
182 See NY PENAL LAW § 85.00 (McKinney 2009).
183 See William C. Donnino, Practice Commentary, in McKinney’s CONSOLIDATED LAWS OF NEW YORK ANNOTATED BOOK 39, at 21–23 (West 2009). See also People v. White, 83 A.2d 668, 669 (N.Y. App. Div. 1981) (remanding to the sentencing court “for the imposition of the days of the particular weekends defendant is to serve . . . so as to preserve defendant’s employment and to properly fulfill the purposes of an intermittent sentence); People v. Warren, 360 N.Y.S.2d 961, 969 (N.Y. Sup. Ct. 1974).
184 See Archana Prakash, Supervising Attorney at the Neighborhood Defender Service of Harlem, states that a request for intermittent sentencing can be a part of plea negotiations and plea bargaining in New York, just as any other aspect of sentencing can be. Telephone Interview with Archana Prakash, Supervising Attorney, Neighborhood Defender Service of Harlem (Dec. 22, 2011).
185 See Chin & Holmes, supra note 177, at 699. See also, e.g., State v. Commings, 886 A.2d 824, 830 (Conn. 2005) (“A nolo contendere plea has the same effect as a guilty plea, but a nolo contendere plea cannot be used against the defendant as an admission in a subsequent criminal or civil case.”); Fortson v. Hopper, 247 S.E.2d 875, 877 (Ga. 1978) (“The privilege of entering a plea of nolo contendere is statutory in origin . . . , and it was designed to cover situations where the side effects of a plea of guilty, in addition to the penalties provided by law, would be too harsh.”).
187 Padilla, 130 S. Ct. at 1481.
recognizing that the two groups of defendants are not similarly situated and acting accordingly. This recognition is not only in line with Padilla’s findings, it is also fundamental to the pursuit of proportionate and fair outcomes. As one respondent to the Kings County survey stated, “As with all pleas that have potential collateral consequences, the prosecutor has to determine if the promised sentence, along with the likely collateral consequence, is proportional to the offense that the defendant is pleading to.”

2. Protecting the Finality of Bargained-for Pleas

The first goal in the APRI matrix also considers the value of expediency and efficiency within the prosecutor’s pursuit of justice. Although the finality of bargained-for pleas is not explicitly identified by APRI as an outcome associated with this goal, the Supreme Court has long noted that concerns regarding the protection of pleas from future collateral attack have “special force with respect to convictions based on guilty pleas.” This section will, therefore, focus on such concerns.

In the post-Padilla era, the most effective way for prosecutors to protect the finality of bargained-for dispositions in cases involving immigration penalties is to directly engage with those penalties during plea bargaining and to offer immigration-neutral dispositions when appropriate. This argument is borne out through consideration of the process by which a noncitizen defendant may challenge a bargained-for plea subsequent to Padilla.

Collateral attacks brought under Padilla are subject to the ineffective assistance of counsel analysis laid out by the Court in Strickland v. Washington: first, the defendant must show that counsel’s representation was ineffective in that it “fell below an objective standard of reasonableness”; and, second, she must show that this ineffectiveness prejudiced the outcome of the proceeding. In the context of a Padilla claim, the first prong of ineffectiveness is met where defense counsel incorrectly advised or failed to advise the defendant regarding the deportation risks of a plea.

To establish the second prong, or prejudice, in the context of a guilty plea, “a defendant must show the outcome of the plea process would have been different with competent advice.” In Hill v. Lockhart, the Supreme Court extended the Strickland analysis to plea bargains, finding prejudice where, “but for counsel’s errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial.” The Court has since expanded its understanding of prejudice during plea negotiations, making clear in the companion cases Lafler v. Cooper and Missouri v. Frye that “criminal defendants require effective counsel during plea negotiations” themselves. Prejudice may be established, therefore, where a defendant rejected a formally offered plea because her attorney failed to present her with the offer or misadvised her regarding the risks of instead proceeding to trial. The Court has not explicitly reached the question of

---

189 This quote is from respondent number 44’s response to an open-ended question regarding the role of the prosecutor.

190 See DILLINGHAM ET AL., supra note 32, at 6.


192 Padilla, 130 S. Ct. at 1482 (citing Strickland, 466 U.S. at 694).

193 See Padilla, 130 S. Ct. at 1483.


195 Hill, 474 U.S. at 59.


197 Frye, 132 S. Ct. at 1408.

198 Lafler, 132 S. Ct. at 1385.
whether prejudice can also be established where counsel’s ineffectiveness precluded the defendant from obtaining a hypothetical better plea bargain, but its Sixth Amendment jurisprudence may be moving in this direction. In Padilla, Justice Stevens described the prejudice inquiry as follows: “... a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.” This statement, particularly when viewed alongside Lafler and Frye, may reflect a broader understanding of the prejudice inquiry going forward—one that encompasses the multi-layered decisionmaking process a defendant faces when considering a plea that will alter his life in myriad ways.

Where a plea has been obtained after engaged and creative negotiations between the prosecution and the defense with regard to deportation risks, a defendant will be hard-pressed to establish prejudice even with clear evidence of ineffective assistance. This may best be demonstrated through the following hypothetical:

Christopher, a long-time lawful permanent resident with no prior arrests, is charged with attempted sale of a small amount of heroin. John, his defense attorney, begins engaging with Mary, the assigned assistant district attorney, to negotiate a plea. Mary is aware of Christopher’s noncitizen status and aware of the mandatory deportation consequences of a plea to the attempted sale of a controlled substance. She is also aware, however, that while a plea to a possession-only drug offense would still trigger the grounds of removability for Christopher, it would likely preserve his ability to seek relief from removal in immigration court in the form of “cancellation of removal.”

Mary reaches out to John and offers Christopher a plea to a felony drug offense that does not require sale or intent to sell as an element but is the same level felony as the sale offense. In exchange, Mary seeks the same amount of jail time she would have asked for the sale offense, but

199 Justice Scalia, in dissent in Lafler, decried the Court’s movement toward a “constitutional right to effective plea-bargainers.” Lafler, 132 S. Ct. at 1392 (Scalia, J., dissenting). Justice Scalia’s concerns may be exaggerated given the Court’s recent decision in Premo v. Moore, refusing to find prejudice where the defendant argued he might reasonably have “obtained a better plea agreement but for his counsel’s errors.” 131 S. Ct. 733, 745 (2011). Premo’s application is limited, however, because the claim was brought under the AEDPA and therefore required a finding that the original state court decision constituted an “unreasonable application of clearly established federal law,” a standard the Court calls “doubly” as deferential as the standard Strickland analysis. Id. at 740. For a lower court decision explicitly considering and accepting the “better bargain” theory of prejudice, see, e.g., Com v. Clarke, 949 N.E.2d 892, 896 (Mass. 2011).

200 Padilla, 130 S. Ct. at 1485 (citing Roe v. Flores-Ortega, 528 U.S. 470, 480, 486 (2000)). See also Lafer, 132 S. Ct. at 1384.


202 See Bibas, supra note 90, at 1145–46 (“Prosecutors also have incentives to ensure that defendants get accurate information about deportation to bulletproof their convictions.”); Gabriel J. Chin & Margaret Love, Status as Punishment: A Critical Guide to Padilla v. Kentucky, 25 CRIM. JUST. 21, 31, 61 (2010) (“Prosecutors and judges who do not want to see today’s case return in six months will take an active part in ensuring that criminal defendants know about collateral consequences...”). Meyer, supra note 100, at 41 (“[T]he Padilla Court suggests that open plea negotiations involving the prosecution’s informed consideration of immigration consequences might help ensure the finality of convictions...”)

203 Christopher would still be subject to the controlled substance grounds of removability, but his conviction would not constitute an aggravated felony and therefore not bar his eligibility for relief in the form of “cancellation of removal,” assuming he had been present in the United States for seven years at the time of the alleged commission of his offense and had established at least five years presence as a lawful permanent resident. See INA § 237(a)(2)(B), 8 U.S.C. § 1227(a)(2)(B) (2006); INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B) (2006); INA § 240A(a), 8 U.S.C. § 1229b(a) (2006).
with a longer period of post-release supervision. Mary makes a note of the conversation and her reasoning in her file.\textsuperscript{204}

John communicates this offer to Christopher, stating that he thinks it is a fair offer and, in any event, Christopher would probably lose if he went to trial. Christopher asks him if the plea will get him in trouble with immigration, and John tells him that he’s not an immigration attorney and he doesn’t know. Christopher decides to accept the deal, pleads guilty, and serves about eight months in jail. At the end of his sentence, ICE picks Christopher up from the local jail and places him in removal proceedings. Christopher learns that he is eligible for cancellation of removal, but fears his claim is weak.\textsuperscript{205} He brings a Padilla-based claim to have his conviction vacated in state court.\textsuperscript{206}

The ineffective assistance of counsel Christopher has suffered in this case is clear: John failed to advise him of the clear deportation risk that accompanies any plea of guilty to a controlled substance offense.\textsuperscript{207} In order to successfully obtain vacatur of his plea, however, Christopher must also demonstrate prejudice—that a rational person in his circumstances would have turned down Mary’s proposed plea had he been correctly advised regarding the deportation risks.\textsuperscript{208} Mary’s actions in this case have made it unlikely that Christopher will succeed on his claim of prejudice. Christopher cannot argue that he would have gotten a “better bargain” to preserve his immigration status, because the record demonstrates Mary already altered her offer to preserve Christopher’s eligibility for cancellation of removal.\textsuperscript{209} Further, a judge would be hard-pressed to find that a rational person in Christopher’s shoes would have chosen to forego the plea—and the chance at obtaining cancellation of removal—in order to go to trial and risk mandatory deportation.\textsuperscript{210} By engaging with the immigration penalties of the

\textsuperscript{204} The American Bar Association standards governing pleas of guilty recommend that prosecuting attorneys make a record of all plea-related discussions with defendant. \textit{ABA Standards of Criminal Justice, Pleas of Guilty}, Standard 14.3-1(a) (3d ed. 1999) [hereinafter ABA PLEAS OF GUILTY]. \textit{See also Missouri v. Frye}, 132 S. Ct. 1399, 1409 (2012) (recommending that prosecution and trial courts might protect against subsequent collateral attacks on convictions by undertaking various safeguards, including documenting all formal plea offers).

\textsuperscript{205} Even those who are able to meet the high burden of establishing eligibility for cancellation of removal must demonstrate to an immigration judge that they merit a favorable exercise of discretion based on a weighing of the equities. \textit{See C-V-T}, 22 l. & N. Dec. at 11.

\textsuperscript{206} Depending on the state in which he was convicted, Christopher might be limited in his options for pursuing post-conviction relief, as many state post-conviction statutes include time bars and jurisdictional restrictions and there is a wide disparity among court decisions considering the availability of coram nobis and habeas corpus type relief for \textit{Padilla}-based attacks on state convictions. For lower court decisions limiting the availability of relief, see, e.g., Ogunwomoju v. United States, 512 F. 3d 69, 73–75 (2d Cir. 2008); People v. Kim, 45 Cal.4th 1078, 1096–1101 (Cal. 2009); People v. Carrera, 940 N.E.2d 1111, 1118 (Ill. 2010); Commonwealth v. Morris, 705 S.E.2d 503 (Va. 2011). \textit{But see}, e.g., Smith v. State, 697 S.E.2d 177, 188 (Ga. 2010) (leaving open the possibility that viable claims of ineffective assistance under \textit{Padilla} might properly be considered via the state habeas statute); People v. Garcia Hernandez, 926 N.Y.S.2d 346, at *1 (N.Y. Co. Ct. 2011) (finding jurisdiction for defendant’s ineffective assistance of counsel claim under \textit{Padilla} pursuant to the state post-conviction statute which has no time bar, see N.Y. CRIM. PROC. § 440.10 (2010)).


\textsuperscript{209} See Roberts, supra note 201, at 741–43 (noting that under the broad understanding of the prejudice inquiry suggested by \textit{Padilla}, the prosecution or judge’s willingness to re-structure a guilty plea is highly relevant).

\textsuperscript{210} See, e.g., Gudiel-Soto v. United States, 761 F.Supp.2d 234, 241 (D.N.J. 2011) (considering the government’s leniency in negotiating a plea as relevant to the determination that a rational person would not have rejected that bargained-for plea and proceeded to trial).
charged offense in this case, Mary has weakened Christopher’s ability to bring a successful claim of prejudice on the basis of John’s ineffective assistance.

In contrast to the informed and individualized consideration exemplified by Mary is the emerging trend discussed above in section I.C.i, where prosecuting offices create and distribute to all defendants a general warning regarding the deportation risks of criminal convictions. These policies have presumably been adopted in an effort to moot future claims brought under Padilla. Blanket prosecutorial advisals, however—like the judicial advisals discussed above in section I.B.ii—simply cannot serve as a substitute for the competent and thorough advice of trusted counsel. In fact, a generalized notice distributed by a prosecutor will be even less effective than a judicial advisal in ensuring that a defendant is truly making an informed plea because the defendant will rightly view the prosecutor as her adversary.

To the best of my knowledge, no court has yet considered how a prosecutorial notice of the risks of deportation might influence the Strickland analysis in the context of an ineffective assistance claim brought under Padilla. However, many courts have considered how judicial advisals affect such claims, and these decisions shed some light on how prosecutorial advisals might be viewed. Lower courts are divided as to how a judicial advisal given during plea allocation factors into the Strickland analysis in claims brought under Padilla. Some courts have found that a judge’s admonition regarding the deportation risks of a plea does not cure counsel’s misadvice regarding those risks or alleviate the ensuing prejudice. We can assume that these courts would similarly find a prosecutorial advisal insufficient to correct for defense counsel’s ineffectiveness under a Padilla claim.

Other courts have found that a warning issued by a judge can cure ineffective assistance of counsel; these decisions, however, largely focus on the weight a judicial warning should be accorded due to the unique and impartial role that a judge plays. In Flores v. Florida, for example, Mr. Flores sought to have his plea to misdemeanor possession of drug paraphernalia withdrawn after he was placed in removal proceedings. Mr. Flores had been warned by the judge during his plea colloquy that his conviction might result in deportation, and he

---

211 Oral argument during Padilla indicates that the justices considered and rejected the proposition that judicial advisals might be sufficient to cure the issues raised by the case. Transcript of Oral Argument at 31, Padilla v. Kentucky, 130 S. Ct. 1473 (2009). Justice Kennedy asked Deputy Solicitor General Michael Dreeben whether “we shouldn’t just adopt an amendment to Rule 11 [the federal rule of criminal procedure governing pleas] in which the judge says, any collateral consequences with respect to your plea are not the concern of this court and will not be grounds for setting aside this plea.” Id. Dreeben assured Justice Kennedy that the relevant rules committee had twice considered such an amendment and would be doing so again “contemporaneously” with the Court’s ruling. Id. at 32. The outcome of the case, of course, indicates that the Justices were not satisfied by this response.

212 See, e.g., State v. Sandoval, 249 P.3d 1015, 1020–21 (Wash. 2011) (internal citations omitted) (finding that the statutorily required written warning regarding the risks of deportation by the court as well as defendant’s affirmation during plea allocation that he had reviewed the statement with his counsel did not excuse defense attorney from providing competent advice regarding immigration risks and, in fact, served to “underscore how critical it is for counsel to inform her defendant that he faces a risk of deportation.”); People v. Garcia, 907 N.Y.S.2d 398, 407 (N.Y. Sup. Ct. 2010) (holding a general warning by the court during the plea colloquy that a controlled substance offense “can certainly lead to deportation . . . will not automatically cure counsel’s failure [to advise regarding deportation risks of the plea] nor erase the consequent prejudice”); Ex parte Tanklevskaya, No. 01–10–00627–CR, 2011 WL 2132722, at *11 (Tex. App. May 26, 2011).

213 See, e.g., Flores v. Florida, 57 So.3d 218, 220 (Fla. Dist. Ct. App. 2010); United States v. Bhindar, No. 07 Cr 711-04 (LAP), 2010 WL 2633858, at *6 (S.D.N.Y. June 30, 2010) (finding a judicial advisal during the plea colloquy, to which the defendant affirmed his understanding on the record, “was sufficient to put Bhindar on notice that he would be removed if he pled guilty,” mooting out his claim of prejudice); Amreya v. United States, Nos. 4:10-CV-503-A, 4:08-CR-033-A, 2010 WL 4629996, at *5 (N.D. Tex. Nov. 8, 2010) (finding defendant could not establish prejudice based on attorney’s deficient performance where the court issued an advisal regarding deportation risks during allocation and the defendant testified that he understood that warning and asked for the court’s intervention to avoid subsequent deportation at sentencing).

214 See 57 So.3d at 218.
affirmed on the record that he understood this warning. He nonetheless proceeded to enter his plea in reliance on incorrect advice by his attorney that a misdemeanor conviction would not trigger deportation. The appellate court found that Mr. Flores’s counsel’s misadvice had not prejudiced the outcome of the proceeding because, “A defendant’s sworn answers during a plea colloquy must mean something. A criminal defendant is bound by his sworn assertions and cannot rely on representations of counsel which are contrary to the advice given by the judge.”

I have highlighted the *Flores v. Florida* decision because the Court’s holding rested on a perception that judicial advisals carry certain indicia of credibility, rendering them trustworthy to the defendant. This perception may not be grounded in reality; as discussed above in section 1.B.ii, defendants are unlikely to absorb judge-issued warnings in a manner similar to advice they would receive from counsel. Nonetheless, these indicia are often perceived to be reliable, and distinguish judicial advisals from prosecutorial warnings in the following ways: first, the judicial warning comes from a source the defendant is expected to trust, unlike a prosecutorial notice which comes from the defendant’s adversary; and second, judicial advisals are traditionally given during the plea allocution and involve a back and forth between the judge and the defendant confirming the defendant’s understanding of the warning, unlike a prosecutorial notice merely handed to the defendant by the prosecutor. The characteristics of the judicial warning that give it perceived legitimacy when considered as part of the prejudice inquiry are absent from the prosecutorial warning. It is unlikely, for this reason, that courts would find a blanket written notice by a prosecutor to moot out subsequent claims of ineffectiveness raised by a defendant under *Padilla*.

**B. ENSURING COMMUNITY SAFETY**

The second goal in the APRI matrix is simply stated: “ensuring safer communities.” The prosecutor’s responsibility as a steward of public safety is echoed in the various standards governing professional prosecutorial conduct, often described as primary to the responsibility to secure convictions in individual cases. The APRI study group began its discussion of this goal by noting that, “ensuring safer communities reaches beyond mere enforcement of laws.” When prosecuting noncitizens, the prosecutor must look beyond the individual crime she is prosecuting to envision the impact the immigration penalties of that crime will have not only for the accused but for the accused’s spouse, children, and larger community.

Vast numbers of individuals deported on the basis of a criminal conviction leave behind parents, spouses, and children who are United States citizens or lawful permanent residents of the United States. Human Rights Watch estimates that ICE separated more than one million individuals from their spouses and children through crime-based deportation between the years 1997 and 2007. As ICE escalates its enforcement operations targeting those with criminal

---

215 *See id. at 218–19.*

216 *See id. at 218.*

217 *See id. at 220.*

218 *See DILLINGHAM ET AL., supra note 32, at 11.*

219 *See NDAA NATIONAL PROSECUTION STANDARDS, supra note 26, at Standard 1-1.2; ABA STANDARDS, PROSECUTION FUNCTION, supra note 26, at Standard 3-1.2.*

220 *See DILLINGHAM ET AL., supra note 32, at 11.*

221 *See, e.g., DEPARTMENT OF HOMELAND SECURITY OFFICE OF THE INSPECTOR GENERAL, REMOVALS INVOLVING ILLEGAL ALIEN PARENTS OF UNITED STATES CITIZEN CHILDREN 1–9 (2009) (reporting that 108,434 undocumented immigrants deported between 1998 and 2007 were parents of children who were United States citizens).*

222 *See HUMAN RIGHTS WATCH, FORCED APART (BY THE NUMBERS): NONCITIZENS DEPORTED MOSTLY FOR NONVIOLENT OFFENSES 4 (2009).*
convictions,\textsuperscript{223} we can safely assume that these numbers have only increased and will continue to do so. In fact, if deportation rates continue at their current pace, ICE will deport more parents of United States children in 2011 and 2012 than it did in the preceding ten years.\textsuperscript{224}

A bargained-for deportable plea triggers a domino effect that only begins with the defendant’s deportation. If the deported defendant has a spouse and children, they will be left behind. The children, now living in a single-parent home instead of a dual-parent home, will become vulnerable to negative outcomes and potential involvement with the criminal justice system themselves. The spouse, now lacking a primary breadwinner, may be forced to turn to public benefits for herself and her children. If both parents have been deported or one parent is otherwise absent, the children may be swept into foster care. This section looks at statistical analyses that demonstrate the reality and impact of each of these scenarios, focusing first on the risks to children left behind by deportation and concluding with a discussion of the impact on public safety net programs when primary breadwinners are deported.

1. A Dangerous Cycle: Children Left Behind by Deportation

Ordered by Congress to begin tracking the deportation of parents of United States citizen children, ICE reported in early 2012 that, during the first half of fiscal year 2011, it had removed 46,486 parents of at least one child who was a United States citizen.\textsuperscript{225} This number constitutes 22 percent of ICE’s total removals during that period.\textsuperscript{226} In a recent study of 85 families affected by ICE enforcement actions, the Urban Institute found the most common change in family structure to be the conversion of a two parent home to a single parent home.\textsuperscript{227} When a parent is deported, some children remain behind in the care of a second parent or in the care of another relative.\textsuperscript{228} Some children, however, are left behind with no one to care for them and are forced into the foster system. At least 5,000 children are presently in foster care nationwide subsequent to the deportation or detention of a parent by ICE.\textsuperscript{229}

A child separated from one or both parents because of an immigration enforcement action is statistically more likely to engage in behavior that is destructive both to herself and her community.\textsuperscript{230} Of the children studied by the

\textsuperscript{223} See supra section I.A.
\textsuperscript{227} \textit{The Urban Institute, Facing Our Future: Children in the Aftermath of Immigration Enforcement} \textit{viii} (2010).
\textsuperscript{228} See id.
\textsuperscript{229} \textit{Applied Research Center, supra} note 224, at 22. The authors of the report note that targeted enforcement programs such as Secure Communities are likely to increase dramatically the rate of foster care cases that result from deportation, based on their finding that in counties with a 287(g) agreement in place, children in foster care were about 29 percent more likely to have a detained or deported parent. See id. at 27. See note 58 above for a description of Secure Communities and the 287(g) program.
\textsuperscript{230} Of course, the statistical evidence that follows merely confirms the human intuition that losing a parent to deportation is likely to set a child adrift. In 1998, the Los Angeles Times reported on the story of Gerardo Anthony Mosquera, Jr., a 17 year old junior in high school and U.S.-born citizen who began “shutting himself in his room and acting moody” after his father was deported to Colombia on the basis of a 1989 conviction for selling a $10 bag of marijuana to a police informant. See Patrick J. McDonnell, \textit{Deportation Shatters Family}, \textit{Los Angeles Times}, Mar. 14, 1998, at 1. His moodiness and depression culminated in his taking his own life by shooting himself. \textit{Id.}
Urban Institute whose families had been affected by immigration detention or deportation, 41 percent began displaying “angry or aggressive” behavior that was persistent over the long term. 231 These results are consistent with generalized studies of children brought up in single-parent or non-intact family homes, which show significantly increased risks of incarceration and illegal behavior, even when controlling for factors such as poverty and race. 232 Children in mother-only homes, for example, are twice as likely to face incarceration as children in homes with both parents present, controlling for common background and low income. 233

Not surprisingly, children left in the foster care system are at even greater risk of a wide host of negative outcomes that endanger public safety. 234 Perhaps of greatest concern for prosecutors, children who spend a significant amount of time in the foster system prior to aging out are overwhelmingly more likely to become involved in the criminal justice system than their peers who were raised in intact homes. 235 In a 2009 study of young adults who had aged out of the foster system, for example, 81 percent of the male respondents reported having been arrested, compared with a nationwide rate of only four percent. 236 Young adults who were raised in foster care also struggle with higher than average rates of unwanted pregnancies, unemployment, and educational deficits. 237

Securing a deportable conviction for a noncitizen defendant, therefore, may leave that defendant’s child or children at greater risk of future illegal behavior and involvement with the criminal justice system. This risk is even more significant among foreign-born communities, which have lower rates of crime and incarceration than native-born communities. 238 Crime-based deportations that separate children from their parents create risk in communities which, left alone, are statistically safer than the rest of the country.

2. Resource Drain: Increased Reliance on Public Benefits

Logic and anecdotal experience tell us that many of the men and women detained and deported by ICE are breadwinners, and the families these men and women leave behind face economic crises, often resulting in increased reliance on public benefits. 239 The Urban Institute’s study confirmed this, reporting

231 See THE URBAN INSTITUTE, supra note 227, at 43.
233 See Harper & McLanahan, supra note 232, at 382. Angie Junck, Staff Attorney, Immigrant Legal Resource Center, confirms anecdotally that she and her colleagues are increasingly seeing children of deported parents coming through the juvenile justice system. Interview with Angie Junck, supra note 31.
235 See id. at 68 (finding, in a study of 763 adults who entered foster care prior to their sixteenth birthday and remained in its care at age seventeen, and whose primary reason for placement was not delinquency, that 42 percent of the men reported having been arrested, 23 percent reported having been convicted of a crime, and 45 percent reported having been incarcerated).
236 See id. at 69.
237 See id. at 22–69.
238 See Rumbaut, supra note 48, at 4; Butcher & Piehl, supra note 48, at 8; Sampson, supra note 48, at 29.
239 From 2010–2011, I represented a lawful permanent resident who had lived in the United States for most of his life, supporting his U.S. citizen wife and two children through his own carpentry
widespread economic distress among the families surveyed in the immediate and long-term aftermath of ICE enforcement actions.\textsuperscript{240} Of the eighty-five families interviewed shortly following their loved one’s apprehension by ICE, nearly two-thirds reported difficulty paying household bills.\textsuperscript{241} Of eight families in the study who were homeowners prior to the enforcement action, four lost their homes.\textsuperscript{242} More than half of the parents interviewed for the study reported that the food they could afford to buy their families did not last long enough, they couldn’t afford to buy more food, or they couldn’t afford to eat balanced meals.\textsuperscript{243} Many parents reported eating less themselves so their children could eat more.\textsuperscript{244}

The study attempted to discern ways in which families managed to get by despite these economic hardships. Many families received support, including a place to stay, from networks of family and friends.\textsuperscript{245} For others, government assistance programs provided “crucial aid,” including cash welfare (Temporary Assistance for Needy Families, or TANF); food stamps (the Supplemental Nutrition Assistance Program); Supplemental Nutrition Program for Women, Infants and Children; and free or reduced-price school meals.\textsuperscript{246} Reliance on TANF and food stamps was found among only one in ten of the families surveyed prior to the ICE enforcement action, but jumped to one in seven in its aftermath.\textsuperscript{247}

In cases where criminal allegations involve domestic abuse, the economic insecurity that follows the defendant’s deportation is most often felt by the victim of the alleged crime. This stands at odds with the evolving view of the prosecutor not only as a steward of public safety but as a protector of the rights of victims of crime.\textsuperscript{248} Robert Johnson tells the story, for example, of a “highly respected district attorney in a major jurisdiction” who agonized over the outcome of a child abuse case where the complaining witness was a child and the defendant was the child’s father.\textsuperscript{249} The district attorney, Mr. Johnson explains, knew that “[t]his father, after all, would be deported upon conviction, destroying a family that the district attorney and the victim’s family thought could be saved.”\textsuperscript{250} This district attorney’s primary focus was not the hardship to the defendant, but the unanswerable question of what would happen to the defendant’s wife and child who, upon his deportation, would be left without a primary breadwinner.\textsuperscript{251} Similarly, a woman complaining of domestic violence may very well want protection from her husband or partner’s abuses, but she may not want him to be

\textsuperscript{240} See THE URBAN INSTITUTE, supra note 227, at 28–32.
\textsuperscript{241} See id. at 29.
\textsuperscript{242} See id. at 30–31.
\textsuperscript{243} See id. at 30–32 (comparing this statistic to the national average of one in eight American families).
\textsuperscript{244} See id.
\textsuperscript{245} See id. at 35.
\textsuperscript{246} See id. at 36.
\textsuperscript{247} See id. at 38.
\textsuperscript{248} See, e.g., NDAA NATIONAL PROSECUTION STANDARDS, supra note 26, at Standard 1-1.2 (“The [prosecutor’s primary] responsibility includes . . . ensuring . . . that the rights of all participants, particularly victims of crime, are respected.”). The APRI matrix identifies “victim and witness satisfaction with their experience in the criminal justice system” as an important measurement of effective prosecutorial conduct. See DILLINGHAM ET AL., supra note 32, at 11.
\textsuperscript{249} See Johnson, supra note 175, at 33.
\textsuperscript{250} Id.
\textsuperscript{251} Interview with Robert Johnson, supra note 167.
deported and therefore precluded from serving as a father to his children and providing much-needed child support. 252

C. INTEGRITY IN THE PROSECUTION PROFESSION

The third and final objective in the APRI matrix is to “promote integrity in the prosecution profession,” including the pursuit of “competent and professional behavior.” Like the pursuit of justice, the pursuit of integrity in any given profession is necessarily quite subjective. Nonetheless, one concrete way to gauge outcomes concerning professionalism is to turn to the standards of ethics governing that profession. This section begins with an analysis of prosecutorial standards of ethics, and then turns to questions many prosecutors have raised regarding the propriety of prosecutors, as state actors, considering federally imposed immigration penalties.

1. Prevailing Ethical Standards

Underlying all ethical standards governing prosecutorial conduct is the admonition that the prosecutor serve a role apart from that of mere advocate—she must pursue not only convictions but the interests of society as a whole, and she must pursue justice writ large. The Model Rules of Professional Conduct, for example, devote an entire section to the “special responsibilities of a prosecutor,” assigning the prosecutor “the responsibility of a minister of justice and not simply that of an advocate.” This ethical responsibility to justice and to society at large weighs particularly heavily in the context of plea bargaining, where the prosecutor wields immense power and discretion. Pursuing a “just” plea bargain is necessarily different from pursuing a just trial outcome, where the focus is on the identification of guilt versus innocence. The reality of the plea bargaining system is that defendants—even rational ones—choose whether to plead guilty on the basis of a range of considerations of which actual guilt is only one.

252. See ABA CRIMINAL JUSTICE SECTION, RECOMMENDATION ADOPTED BY THE HOUSE OF DELEGATES NO. 100C, 5 (2010) [hereinafter ABA Recommendation 100C] (“In many cases [avoiding deportation] is the strong wish of the victim, who wants the protections afforded in a domestic violence [case], but does not want the abuser deported because of a need for continuing child support or a desire to try to salvage a parent-child or couple relationship.


255. MODEL RULES OF PROF’L CONDUCT R. 3.8 and Commentary to R. 3.8 at [1]. See also ABA STANDARDS, PROSECUTION FUNCTION, supra note 26, at Standard 3.1-2(d) (“[t]he duty of the prosecutor is to seek justice, not merely to convict”); NDAA NATIONAL PROSECUTION STANDARDS, supra note 26, at Standard 1-1.2.

256. See Ellen Yaroshfsky, Keynote Address: Enhancing the Justice Mission in the Exercise of Prosecutorial Discretion, 19 TEMP. POL. & CIV. RTS. L. REV. 343, 350 (2010) (“Our system is akin to an administrative law model where the prosecutor acts in an investigative and ultimately quasi-judicial capacity because the prosecutor makes the decisions as to charging, plea bargaining and therefore ultimate disposition. We need to consider the ramifications of this administrative system of criminal justice and adopt transparency and accountability mechanisms to ensure fair processes.”). See also Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) (“To a large extent . . . horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long.”) (citation omitted).


258. See Stephen J. Schulhofer, Plea Bargaining as Disaster, 101 YALE L.J. 1979, 2000 (1992) (arguing that innocent defendants are likely more risk averse than guilty defendants, making them more likely to accept a plea offer that entails a small penalty rather than face the risks inherent in trial); Roberts, supra note 201, at 726–27 (examining the many factors weighing in a rational person’s decision whether to accept or reject a plea offer); O’Hear, supra note 158, at 418–19 (arguing that for many indigent defendants there is no real option of going to trial because of litigation expenses and the specter of prolonged pretrial detention for those unable to pay bail). See also Samuel R. Gross, Convicting the Innocent, 4 ANN. REV. LAW. SOC. SCI. 173, 181 (2008).
Standards of prosecutorial ethics recognize that to pursue a “just” plea outcome, the ethical prosecutor must consider the breadth of this range. The NDAA National Prosecutor Standards, for example, list twenty factors prosecutors “should consider” prior to finalizing a plea agreement.\textsuperscript{260} Included in this list are many factors having nothing to do with guilt or innocence, such as any “[u]ndue hardship caused to the defendant” by the plea.\textsuperscript{260} The indirect consequences of a plea, therefore, demand the attention of the ethical prosecutor because they weigh heavily in any logical assessment of the justice of a bargained-for outcome.\textsuperscript{261}

And if this is the case, surely deportation risks demand heightened attention. \textit{Padilla} acknowledged the gravity of immigration-related consequences of crimes, stating once and for all that they are not “collateral,” but a “particularly severe ‘penalty’ . . . intimately related to the criminal process.”\textsuperscript{262} In August of 2010, the Criminal Justice Section of the American Bar Association considered the impact of \textit{Padilla} on prosecutors’ ethical obligations during plea bargaining.\textsuperscript{263} The ensuing report and recommendation urges prosecutors and defense attorneys to work together whenever possible “to identify a plea—to a felony or misdemeanor offense—that is roughly equivalent to the one charged but is safer for immigration purposes.”\textsuperscript{264}

As addressed above in section II.B, the risk of deportation flowing from a plea also bears on questions of public safety that the ethical prosecutor is required to place \textit{ahead} of the outcome in any individual case.\textsuperscript{265} Furthermore, in many cases involving domestic violence allegations, the risk of deportation will negatively affect the complaining witness, who may lose vital financial support as well as a second parent to her children.\textsuperscript{266} This potential for undue hardship to victims is also among the factors prosecutors are obligated to consider during plea negotiations.\textsuperscript{267}

Engaging with immigration risks during plea negotiations requires prosecutors to consider alternative plea offers wherein the offense or sentence deviates from those originally contemplated by the charging document or the prosecutor’s original offer. Professional standards explicitly authorize this practice where the alternative plea is to an offense that is supported by the factual allegations of the case.\textsuperscript{268} Furthermore, the United States Supreme Court has

\begin{itemize}
\item \textsuperscript{260} NDAA NATIONAL PROSECUTION STANDARDS, supra note 26, at Standard 5-3.1.
\item \textsuperscript{260} See id. at Standard 5-3.1(g). The manual prescribing the ethical principles of prosecution for U.S. attorneys also requires that “all relevant considerations” be weighed during the plea negotiation process, including “the probable sentence or other consequences if the defendant is convicted.” U.S. ATTORNEYS CRIMINAL RESOURCE MANUAL, PRINCIPLES OF FEDERAL PROSECUTION 9-27.420(8) (2002) [hereinafter USA CRIMINAL RESOURCE MANUAL].
\item \textsuperscript{260} See Bibas, supra note 90, at 1138–40 (proposing that Justice Stevens’s discussion of creative plea bargaining creates a new understanding of what constitutes a just plea, in that, “[t]he Court’s concern now reaches beyond a defendant’s factual guilt of a charge to evaluate whether the punishment is fitting”).
\item \textsuperscript{262} Padilla, 130 S. Ct. at 1481.
\item \textsuperscript{263} See ABA Recommendation 100C, supra note 252.
\item \textsuperscript{264} See id. The Recommendation identifies examples of “basic immigration strategies that are designed to give the prosecution what is required, while avoiding making the defendant removable or ineligible for relief from removal,” such as negotiating a 364 day sentence rather than 365 in order to avoid an aggravated felony conviction. \textit{Id.} Section I.B.ii above explores other ways in which pleas can be negotiated to mitigate deportation risks without straying from the severity or nature of the originally charged offense.
\item \textsuperscript{265} See NDAA NATIONAL PROSECUTION STANDARDS, supra note 26, at Standard 1-1.2.
\item \textsuperscript{266} Respondent 119 to the Kings County survey described the wishes of the victim as central to his or her decision making in any case, stating, “There are occasions in which the victim does not want the defendant deported because the victim would prefer to have the defendant in their children’s lives.”
\item \textsuperscript{267} See NDAA NATIONAL PROSECUTION STANDARDS, supra note 26, at Standard 5-3.1(t); USA CRIMINAL RESOURCE MANUAL, supra note 260, at 9-27.420(7).
\item \textsuperscript{268} See ABA PLEAS OF GUILTY, supra note 204, at Standard 14-3.1(iii) (sanctioning the dismissal of charges in exchange for the defendant’s plea of guilty or nolo contendere to another offense reasonably related to defendant’s conduct”); NDAA NATIONAL PROSECUTION STANDARDS, supra note 26, at Standard 5-1.2 (providing prosecutors may agree to a disposition that includes the
sanctioned the creative negotiation of alternative pleas, acknowledging in *Padilla* that “a criminal episode may provide the basis for multiple charges, of which only a subset mandate deportation following conviction.”

2. Federalism Concerns

Although most state prosecutors accept that it is appropriate to consider collateral consequences generally during plea bargaining, many feel that immigration penalties are different because they are federal in nature. One respondent to the Kings County survey encapsulated this view when he or she stated that “the prosecutor is not in the business of immigration policy.” This concern goes to the nature of the prosecutorial profession and its limits. Are state prosecutors, by making decisions during plea negotiations that will affect immigration penalties down the line, improperly or unethically interfering with functions that should be left to the federal government?

This question, rooted in federalism concerns, is premised on misapprehensions of both the role of the state prosecutor and the role of federal immigration enforcement. It is undoubtedly the role of the federal government, through agents of the Department of Homeland Security, to make determinations regarding whether the criminal grounds of deportability apply to any given noncitizen and whether she will, therefore, be deported. However, Congress has written the criminal grounds of deportability so that their applicability hinges on whether an individual has been convicted of a crime, not on her underlying conduct. In fact, immigration judges are routinely precluded from looking to dismissal of charged offenses in exchange for a plea of guilty or nolo contendere to “another offense or other offenses supported by the defendant’s conduct” *Fedor v. R.C.M.* (allowing federal prosecutors to negotiate a plea to “a lesser or related offense” in exchange for the dismissal of originally brought charges); USA CRIMINAL RESOURCE MANUAL, supra note 260, at 9-27.430 (requiring that in a plea agreement defendant plead to a charge with “an adequate factual basis”).

Concerns regarding the federal nature of immigration penalties were raised by five respondents to the Kings County Survey in response to an open-ended question regarding the role of the prosecutor. However, these concerns are likely more widespread than this number indicates. David Angel, Special Assistant District Attorney in the Santa Clara, California District Attorney’s Office, recalls that this concern surfaced repeatedly when he and District Attorney Jeffrey Rosen met with stakeholders prior to developing the Santa Clara policy discussed above in section I.C.i. Further, practitioners providing technical support on immigration law to criminal defense attorneys report that this concern is commonly raised by state prosecutors when defense attorneys seek immigration-neutral alternative plea offers. Interview with Raha Jorjani, supra note 31; Interview with Manuel Vargas, supra note 31; Interview with Ann Benson, supra note 31.

Respondent number 32 to the Kings County survey included this statement in his or her response to an open-ended question regarding the role of the prosecutor with regard to immigration consequences of charged offenses.


See, e.g., INA 237(a)(2)(A)(ix)(II); 8 U.S.C. § 1227(a)(2)(A)(ix)(II) (2006 & Supp. IV 2011); see also Jean-Louis v. Att’y Gen., 582 F.3d 462, 474–75 (3d Cir. 2009) (“[T]he BIA, prior attorneys general, and numerous courts of appeals have repeatedly held that the term ‘convicted’ [as used in the criminal grounds of deportability] forecloses individualized inquiry in an alien’s specific conduct and does not permit examination of extra-record evidence.”); Fajardo v. U.S. Att’y Gen., 659 F.3d 1303, 1307 (11th Cir. 2011). In fact, Congress’s use of the term “convicted” in the grounds of deportability stands in contrast to its wording of the criminal grounds of inadmissibility, which in some cases do not require a conviction and are based instead on the admission or commission of unlawful activity. See, e.g., INA § 212(a)(2)(C), 8 U.S.C. § 1182(a)(2)(C) (2006 & Supp. III 2010) (providing a ground of inadmissibility for “[a]ny alien who the consular officer or the Attorney General knows has or has reason to believe . . . is or has been in illicit trafficking of any controlled substance”). These grounds are essentially irrelevant to the discussion in this Article, as they may be proved on the basis of any allegation or admission, rendering the outcome of plea negotiations subsequent to a charge immaterial in many cases. See, e.g., *In re Ramirez-Jaines*, File: A098 047 686, 2010 WL 4972451, at *1–2 (B.I.A. 2010) (upholding a determination of inadmissibility under INA § 212(a)(2)(C) on the basis of respondent’s written statement to the police that he had sold cocaine, despite the fact that the
evidence of a noncitizen’s underlying conduct when determining whether a particular conviction triggers the criminal grounds of deportability. 274

Congress has, therefore, left it to the criminal justice system to adjudicate a just disposition arising from allegedly unlawful conduct, only asking the federal immigration authorities to become involved once this disposition has been reached. That federal immigration authorities will become involved down the line in no way abrogates the state prosecutor’s responsibility—as discussed at length in section II.A—to pursue justice in reaching that disposition. In fact, the Board of Immigration Appeals has acknowledged the various “valid reasons” why a state criminal conviction may not reflect all aspects of the related underlying conduct, including the fact that “prosecutors may modify charges in State criminal proceedings . . . to minimize the immigration consequences for criminal aliens.” 275 The immigration adjudicator “simply [has] no authority to consider such policy matters” when adjudicating removability. 276

Professor Daniel Kanstroom has discussed these concerns in the context of the national debate over state-specific immigration legislation, asking, “[D]o we really want state prosecutors to be attempting to use deportation for leverage in criminal cases? . . . Is it even legal, in light of the preemption concerns expressed by the Department of Justice in its challenges to the Arizona laws?” 277 Professor Kanstroom refers here to S.B. 1070, passed by the Arizona Legislature in 2010 with the stated intention of making “attrition through enforcement” Arizona’s public policy by, among other things, requiring local police officers to verify the immigration status of all arrestees before their release from custody. 278

Yet the equation of state immigration laws like S.B. 1070 to state prosecutors’ consideration of immigration penalties during plea bargaining is inapt. The Department of Justice complaint referenced by Professor Kanstroom argues that various provisions of S.B. 1070 are preempted by the federal immigration scheme and therefore tread on the Supremacy Clause of the United States Constitution. 279 The United States Supreme Court has long held that state laws involving “a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain” are preempted by the federal immigration scheme. 280 The section of S.B. 1070 mentioned above, for example, requiring local police officers to verify the immigration status of all arrestees before their release, was struck down by the Court of Appeals for the Ninth Circuit because it “interferes with Congress’
scheme” by “assum[ing] a role in directing [Arizona’s state officers] how to enforce the INA.” 281

The simple fact that a state action may affect a noncitizen, however, does not in and of itself raise preemption concerns. 282 State prosecutors, in fact, cannot avoid making decisions throughout the course of a criminal case that will necessarily affect a noncitizen defendant’s immigration status; because of the entwined nature of criminal and immigration law, 283 there is simply no way around this reality. The same is true when state legislatures create or modify state penal codes, thereby creating intentional or unintentional ripple effects for noncitizens facing criminal charges. An amendment to a state’s penal code might, for example, create a removable offense where one did not previously exist, or vice versa. Were this behavior to raise preemption concerns, state legislatures across the country would be precluded from altering their own criminal codes for the realistic fear that legislated amendments might affect noncitizen defendants facing removal.

State prosecutors make decisions every day that impose consequences upon defendants in areas of law that are traditionally defined by the federal government. Many state convictions, for example, render the convicted individual unable to vote for a certain period of time or indefinitely. 284 Although Congress has ultimate authority over the regulation of voting rights, 285 it would be uncontroversial for a state prosecutor to consider during plea bargaining a conviction’s impact on a defendant’s ability to vote. Professor Juliet Stumpf has noted that many of the penalties triggered by state criminal convictions limit “incidents of citizenship” that are federal in nature; by attaching them to criminal conduct, our society has determined that it is sometimes appropriate to curtail these rights in order to “diminish the societal membership status of the individual convicted.” 286 Decision making as to when such curtailment is appropriate is at the heart of the prosecutor’s traditional role.

III. BEST PRACTICES

Throughout this Article, I have argued that prosecutorial ethics and interests are best met via direct engagement with immigration-related penalties during plea bargaining and a policy of openness toward alternative, immigration-neutral pleas in appropriate cases. I have also argued against the prosecutorial practice of distributing blanket advisal notices. This Part explores what a formalized policy of informed consideration might look like in practice. I begin by recommending that offices adopt written policies on this issue and then discuss elements to include in such a policy. I conclude with recommendations regarding training for trial-level prosecutors on questions of law and policy that arise in the prosecution of noncitizen defendants.

282 DeCanas, 424 U.S. at 355 (“[T]he Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted by this constitutional power, whether latent or exercised.”). See also, e.g., United States v. Alabama, 813 F. Supp. 2d 1282, 1330 (N.D. Ala. 2011) (holding that the United States is unlikely to succeed in its claim that a provision of the state law criminalizing various activities including the harboring and transporting of an undocumented immigrant is preempted by federal law because the section does not attempt to directly regulate “who should or should not be admitted into the country, and the conditions under which a legal entrant may remain”) (citing DeCanas, 424 U.S. at 355), aff’d in part, 443 F. App’x 411 (11th Cir. 2011).
283 United States Const. art. I, § 4, cl. 1; Foster v. Love, 522 U.S. 67, 69 (1997) (“Thus it is well settled that the Elections Clause grants Congress the power to override state regulations by establishing uniform rules for federal elections, binding on the States.”) (internal quotation marks omitted).
284 See supra note 1A.
286 Stumpf, supra note 45, at 404–06, 409.
As a first step, lead local prosecutors should follow the example set by Santa Clara District Attorney Jeffrey Rosen287 and adopt office-wide written policies that encourage the “informed consideration” and creative plea bargaining endorsed by the Supreme Court in Padilla.288 As discussed above in section I.C.i, the Immigrant Legal Resource Center (ILRC) has already created an excellent model policy that can be modified and adopted by offices throughout the country.289

In order to effectively address the issues raised throughout this Article, an effective written policy should, at a minimum, include the following three points. First, it should encourage prosecutors to consider immigration-related penalties at all stages of a case and to use their discretion to reach immigration-neutral dispositions for noncitizens when appropriate. The policy should specify that in order to reach such dispositions, prosecutors may avail themselves of many different tools, including alternative offenses to which a defendant will plead, modified sentencing structures, and modified language in documents in the record of conviction.290 Like the Santa Clara policy discussed above in section I.C.i, a written policy should normalize the consideration of immigration penalties such that trial-level prosecutors should not be required to deviate from standard practice or seek permission from their supervisors in order to offer a modified, immigration-neutral plea.291

Within this first point, policies should explicitly encourage prosecutors to modify plea agreements to ensure that noncitizen defendants have equal access to alternative-to-incarceration programs. As discussed above in section I.B.ii, many noncitizen defendants are effectively precluded from participation in court-ordered drug and mental health treatment programs either because of the existence of an immigration detainer292 or because the program requires the entry of a guilty plea that will trigger irreversible immigration penalties.293 Written policies should encourage prosecutors to consider creative solutions to this problem, such as joining in defense counsel’s request to ICE to lift a detainer,294 or consenting to diversion to treatment prior to the entry of a guilty plea.

Second, lead prosecutors should include in any written policy a reminder that prosecutors are not to impose harsher or additional penalties for noncitizen defendants and ensure that written policies are not used counter to their intended purpose.295

Third, written policies should provide trial-level prosecutors with guidance as to when it is appropriate to alter a plea to reach an immigration-neutral

287 For a discussion of the policy adopted by District Attorney Jeffrey Rosen in Santa Clara County, California, see supra section I.C.i.

288 Padilla, 130 S. Ct. at 1486. For a discussion of why the adoption of such an office-wide nuanced policy furthers prosecutorial goal of protecting the finality of pleas more effectively than the distribution of blanket written notices, see supra section II.A.ii.

289 See ILRC Model Policy, supra note 138, at 1–3.

290 For a detailed discussion and examples of the various ways in which the prosecution and defense may work collaboratively to determine an immigration neutral plea, see supra section I.B.ii.

291 As discussed above in section I.C.i, Special Assistant District Attorney David Angel reports that normalizing the consideration of immigration penalties in this way has increased efficiency in case processing in Santa Clara County. Defendants who have been properly advised regarding the immigration risks of a plea are more likely to settle their case by plea rather than proceed to trial and face both penal- and immigration-related risks. Interview with David Angel, supra note 135.


293 For a discussion of the ways in which the requirement that a guilty plea be entered prior to a defendant’s participation in a treatment program may trigger irreversible immigration penalties, see supra note 118.

294 See, e.g., NEW YORK CITY BAR, IMMIGRATION DETAINERS, supra note 119, at 6 (recommending that judges, prosecutors, defense attorneys and service providers work together to provide information to ICE requesting that detainees be lifted where necessary for defendants to participate in diversion to treatment).

295 The ILRC model policy states, for example, “Prosecutors may not seek additional or harsher penalties for noncitizens.” See ILRC Model Policy, supra note 138, at 2.
disposition. Such guidance should specify that humanitarian considerations, including the hardship the defendant and her family would face should she be deported, appropriately factor into this determination. 296

When negotiating alternate pleas, most prosecutors will seek a disposition that is similar in nature and severity to that which would have been offered in the absence of immigration penalties. 297 This will necessarily mean that less serious charges are more likely to demand the consideration of immigration penalties, as more weighty offenses may simply not support an alternative plea that is immigration-neutral. Written policies may state, as the ILRC model policy does, that an appropriate alternative plea will usually be largely commensurate with the original charge and consequent penalty. 298

Nonetheless, policies should also clarify that in some cases it may be appropriate for prosecutors to offer the defendant a plea to a lesser offense to compensate for the disproportionate penalties the defendant would otherwise suffer. In such cases the prosecutor might consider seeking sentencing concessions from the defendant such as more jail time, a longer period of probation, a steeper fine, or more days of community service. Similarly, in some cases a defendant may seek to “plead up” to a more serious offense so as to avoid immigration penalties where the risk of deportation is more daunting than the risk of jail time or a more serious criminal record. 299 Prosecutors should be aware throughout negotiations that a noncitizen defendant may already have served more time in pre-trial custody than her citizen counterpart because of the existence of an immigration detainer, which often precludes release on bail. 300

A special situation arises in localities where counsel is not appointed for minor offenses that do not carry the possibility of incarceration but do carry potential immigration consequences, as discussed above in section I.B.ii. In such localities, prosecutors should consider the role they can play in ensuring compliance with the spirit of Padilla for unrepresented defendants. Lead prosecutors might, for example, require their trial-level prosecutors not to move forward with a plea until the judge has advised the defendant of the possible immigration consequences and offered her the option of consulting with an attorney. 301

In addition to the adoption of a formal policy on the issue of immigration penalties, management-level prosecutors must ensure that their assistant prosecuting attorneys have access to reliable sources of information regarding these penalties. Justice Stevens’s vision of creative plea bargaining that furthers

---

296 For a discussion of the hardship faced by family members and communities left behind by deportation, see supra section II.B. For a discussion of prosecutors’ ethical obligation to consider these factors during plea bargaining, see supra section II.C.1.

297 Special Assistant District Attorney David Angel of the Santa Clara District Attorney’s Office suggests, for example, that an immigration-neutral plea has been ideally crafted if a United States citizen defendant would be indifferent as to whether to take the originally offered plea or the immigration-neutral plea. Interview with David Angel, supra note 135.

298 See ILRC Model Policy, supra note 138, at 2.

299 For an example of a circumstance in which a defendant might “plead up,” see, e.g., In re Bautista, No. H026395, 2005 WL 2327231, at *8 (Cal. Ct. App. Sept. 22, 2005) (finding defendant was prejudiced by defense counsel’s ineffective assistance of counsel when he accepted a plea to possession of marijuana for sale, a categorical aggravated felony offense, without attempting to negotiate a plea up to transportation for sale, a more serious offense that would have entailed more jail time but supported an argument that the offense was not an aggravated felony because it included within its definition non-sale offenses).

300 An immigration detainer is a nonbinding request issued by ICE to a local law enforcement agency requesting that the agency hold an individual for forty-eight hours beyond her release date so that ICE may pick her up and initiate removal proceedings. 8 CFR § 287.7(a) (2011). Some localities unlawfully refuse to release individuals on bail because of the presence of a detainer. See Shah, supra note 117, at 21. In many circumstances, defendants may choose not to post bail because it will trigger their transfer to ICE detention and effectively deny them the opportunity to conclude their criminal proceedings. See id.

301 For a more detailed recommendation of how judges might ensure noncitizen defendants’ access to counsel without inappropriately inquiring into their immigration status, see Clapman, supra note 110, at 611–17.
the interests of the state and the defense rests on the “informed consideration” of immigration penalties by both sides.302 Despite herculean efforts by non-profit immigrant advocacy organizations across the country,303 both the defense and prosecution bars have a long way to go until achieving this goal. As discussed above in section II.C.i, respondents to the Kings County survey, the vast majority of whom claim to be at least “somewhat familiar” with the immigration consequences of New York Penal Law, are largely reliant on their own research and previous work experience as their source for this knowledge.

When considering trainings and resource provision for prosecutors, the question naturally arises as to where the burden falls when defense counsel and the prosecution are negotiating a plea that may trigger immigration penalties. Does the burden fall entirely on the defense attorney to have mastered the immigration consequences, and should the prosecutor simply trust her understanding? Does the burden fall to the prosecutor to corroborate claims made by defense counsel? Should the prosecutor educate herself regarding these issues independently? Pursuant to Padilla and the Sixth Amendment, it is clear that the burden falls to defense counsel.304 Yet, as I have argued above in section II.C.i, prosecutors cannot effectively carry out their professional and ethical obligations without considering immigration-related penalties, requiring them to be at least reasonably well educated on the law.305

Ideally, prosecutors’ offices will provide their trial level attorneys with in-house training regarding the immigration penalties of crimes and the consideration of these penalties during case processing. In instances where this is not feasible, offices should arrange for trainings by organizations that have traditionally trained the criminal defense bar.306 To supplement hands-on trainings, offices may look to the substantial amount of internet-based material that is devoted to immigration consequences of various state and federal offenses, largely created by immigrant advocacy groups for the defense bar.307 In-house training on immigration penalties of crimes must be complemented by training and supervision on larger questions relating to the exercise of prosecutorial discretion, with a focus on the role of such discretion when seeking just resolutions during plea bargaining.308

Even prosecutors who are well trained regarding the immigration penalties of crimes will be unable to thoroughly analyze the immigration-related penalties of any given offer because they do not have—and should not have—access to pertinent information such as the defendant’s exact immigration status and years of residence in the United States.309 Best practices for implementing the letter and

302 See Padilla, 130 S. Ct. at 1486.
303 See Raghu, supra note 92, at 921–30.
304 See Padilla, 130 S. Ct. at 1480.
305 Given the fiscal crises facing indigent defense services across the country, see Brown, supra note 6, at 1409–10, Ann Benson, the Supervising Attorney at the Immigration Project of the Washington Defender Association, poignantly suggested to me that prosecutors might best pursue justice on immigration-related matters by lobbying their state and local legislatures to better fund local indigent defense services. Interview with Ann Benson, supra note 31.
307 See id. (listing and categorizing the resources regarding immigration consequences of criminal convictions available to criminal defense attorneys in all 50 states and D.C. since 1996); see also OFFICE OF IMMIGRATION LITIG., U.S. DEP’T OF JUSTICE, IMMIGRATION CONSEQUENCES OF CRIMINAL CONVICTIONS: PADILLA V. KENTUCKY i (2010).
308 The American Bar Association adopted a policy in 2007 urging localities to support the development of programs to train all criminal justice professionals, including prosecutors, “in understanding, adopting and utilizing factors that promote the sound exercise of their discretion.” ABA Criminal Justice Section et al., 2007 Mid-year Meeting Policy #103F, http://www.americanbar.org/groups/criminal_justice/policy/index_aba_criminal_justice_policies_by_meeting.html. My thanks to Robert Johnson for directing me toward this policy.
309 See Vargas, supra note 102, at 5 (explaining why a thorough understanding of a defendant’s immigration status and history is necessary to properly advise regarding the immigration consequences of any given offense); Brady & Junck, supra note 100.
spirit of Padilla, therefore, require a relatively collaborative effort between the state and the defense with the goals of, first, a well-informed understanding of the immigration penalties attached to a criminal charge and, second, the humane consideration of those penalties in the pursuit of a just disposition.

**CONCLUSION**

Justice Stevens’s proposal that the informed consideration of immigration penalties during plea bargaining furthers the interests of both the defense and the state calls to mind the late Professor Derrick A. Bell, Jr.’s groundbreaking theory of “interest convergence.”

This theory proposes that the interests of a minority group will only be accommodated when they overlap with the interests of the majority group in power. Decades after presenting the theory in the context of the Supreme Court’s decision in Brown v. Board of Education, Professor Bell acknowledged that interest convergence can be a “useful strategy” for advancing racial justice goals but hoped that advocates would also remember to “show a due regard for our humanity” in challenging accepted societal norms and practices.

Noncitizens facing criminal charges are some of the most vulnerable members of our society. The overlapping interests of the prosecution and defense bars, as identified by Justice Stevens and explored in this Article, should prompt both local prosecutors and defense counsel to engage with immigration penalties during the prosecution of noncitizen defendants. It is my further hope that doing so will open the door to a broader understanding of the pursuit of a merciful and proportionate justice.

310 Professor Bell famously argued that “[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites.” Derrick A. Bell, Jr., Brown v. Board of Education and the Interest-Convergence Dilemma, 93 Harv. L. Rev. 518, 523 (1980). It was only, he believed, because of a momentary overlap of interests among blacks and whites—including white interest in recognizing the racial equality principle so as to bolster America’s standing abroad in the midst of the Cold War and to speed industrialization in the South—that the Supreme Court issued its decision in Brown v. Board of Education. Id. at 524–25 (discussing Brown v. Board of Education, 347 U.S. 483 (1954)). I am indebted to Professor Bell for much of my thinking on this and so many important issues.

311 See Derrick A. Bell, Jr., The Unintended Lessons in Brown v. Board of Education, 49 N.Y.L. Sch. L. Rev. 1053, 1066 (2005).