School of Law
UNIVERSITY OF GEORGIA

Digital Commons @ University of Georgia
School of Law

Scholarly Works

Faculty Scholarship

6-1-2013

The Plea Bargain Crisis for Noncitizens in Misdemeanor Court

Jason A. Cade
University of Georgia School of Law, cadej@uga.edu

Repository Citation

Jason A. Cade, *The Plea Bargain Crisis for Noncitizens in Misdemeanor Court* , 34 Cardozo L. Rev. 1751 (2013),
Available at: https://digitalcommons.law.uga.edu/fac_artchop/917

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ University of Georgia School of Law. It has been accepted for inclusion in Scholarly Works by an authorized administrator of Digital Commons @ University of Georgia School of Law. Please share how you have benefited from this access For more information, please contact tstriepe@uga.edu.

THE PLEA-BARGAIN CRISIS FOR NONCITIZENS IN MISDEMEANOR COURT

Jason A. Cade†

This Article considers three factors contributing to a plea-bargain crisis for noncitizens charged with misdemeanors: 1) the expansion of deportation laws to include very minor offenses with little opportunity for discretionary relief from removal; 2) the integration of federal immigration enforcement programs with the criminal justice system; and 3) the institutional norms in non-federal lower criminal courts, where little attention is paid to evidence or individual equities and where bail and other process costs generally outweigh perceived incentives to fight charges. The Article contends that these factors increase the likelihood that a noncitizen's low-level conviction will not reliably indicate guilt or will be the product of unchecked constitutional rights violations. Unwarranted convictions, many of which trigger deportation and other negative immigration consequences, undermine the integrity of both criminal justice and deportation systems. The Article also argues that, contrary to the Supreme Court's assumption in Padilla v. Kentucky, *lawful permanent resident defendants are often unable to effectively negotiate for immigration-safe dispositions in the low-level cases where the rift between the underlying criminal conduct and the deportation outcome is largest. The Article's analysis suggests that reforms at both federal and state levels remain critical to address the disproportional immigration consequences of minor convictions and the plea-bargain crisis for noncitizens in misdemeanor court.*

† Assistant Professor, University of Georgia Law School. For helpful comments and conversations at various stages of this project, thanks to Rachel Barkow, Stacy Caplow, César Cuauhtémoc García Hernández, Liz Keyes, Issa Kohler-Hausmann, Kevin Lapp, Nancy Morawetz, Mark Noferi, Jenny Roberts, my colleagues in the Lawyering Colloquium at New York University Law School, and participants at the Immigration Law Teachers Conference at Hofstra Law School (2012) and the Scholarship and Teacher Development Workshop at Albany Law School (2013). The Article also benefited from presentations to the law faculties at University of Georgia, University of New Mexico, and University of Denver. Much gratitude to the attorneys who shared their practice experience in misdemeanor court, especially Jocelyn Simonson, Violeta Chapin, and Jennifer Friedman. Annie Mathews, Anthony Ruiz, and Robyn Lim provided terrific research support.

TABLE OF CONTENTS

INTRODUCTION

A public defender working misdemeanor arraignments in New York City represents thirty to fifty new clients in a shift. For each case, the defender briefly reviews the arrest report in the court file, ascertains the prosecutor's plea offer, and then meets with the defendant for about

ten minutes to discuss the options before the case is called.[1] If the defendant asserts he is innocent, or if his account of the arrest raises constitutional issues, the defender may inform him that he can plead not guilty, but that the case will be repeatedly continued over a period of many months until the court can adjudicate a suppression motion or hold a trial.[2] During that time, the defendant will be jailed unless he is released on his own recognizance or can make bail.[3] Overwhelmingly, misdemeanor defendants cannot make bail even where it is set at $1000 or less.[4] In the majority of misdemeanor cases, the defendant pleads guilty at arraignment or soon after, the judge imposes a light, agreed upon sentence, and the defender's representation of the client concludes.[5]

Similar scenarios play out in lower criminal courts throughout the United States, where, following a recent explosion in arrests for low-level offenses, prosecutors now file approximately ten million misdemeanor prosecutions each year, dwarfing the number of felony cases.[6] The system copes with this enormous volume by processing defendants quickly, categorically, and sometimes en masse.[7] Efficiency is a foundational value of misdemeanor courts—one that outstrips other systemic norms like due process, adversarial adjudication, and

---

1 *See* THE SPANGENBERG GRP., STATUS OF INDIGENT DEFENSE IN NEW YORK: A STUDY FOR CHIEF JUDGE KAYE'S COMMISSION ON THE FUTURE OF INDIGENT DEFENSE SERVICES 143 (2006), *available at* http://www.nycourts.gov/ip/indigentdefense-commission/SpangenbergGroupReport.pdf. ("[L]arge percentages of misdemeanor, violation and infraction cases plead out at arraignment, often times after a lawyer has met with his or her client for only a couple of minutes."); Adele Bernhard, *Take Courage: What the Courts Can Do to Improve the Delivery of Criminal Defense Services*, 63 U. PITT. L. REV. 293, 308 n.95 (2002) ("In 2000 in New York City, Assigned Counsel Lawyers handled 177,965 new defendants in the Bronx and Manhattan, 124,177 of those cases were disposed of at the first appearance—most by a plea of guilty entered after no more than a ten-minute consultation with their lawyers.").

2 Ian Weinstein, *The Adjudication of Minor Offenses in New York City*, 31 FORDHAM URB. L.J. 1157, 1172 (2004) (noting that defendants who fight the charges in misdemeanor cases must return to court three to twelve times).

3 In 2008, New York City judges imposed bail as a condition of release in about twenty-five percent of nonfelony cases not resolved at arraignments. *See* Mosi Secret, *Low Bail, but Weeks in Jail Before Misdemeanor Trials*, N.Y. TIMES, Dec. 3, 2010, at A27.

4 HUMAN RIGHTS WATCH, THE PRICE OF FREEDOM: BAIL AND PRETRIAL DETENTION OF LOW INCOME NONFELONY DEFENDANTS IN NEW YORK CITY 1 (2010), *available at* http://www.hrw.org/sites/default/files/reports/us1210webwcover_0.pdf.

5 *See id.* at 3 (reporting that 99.6% of misdemeanor convictions in New York City are guilty pleas); THE SPANGENBERG GRP., *supra* note 1; Bernhard, *supra* note 1; *cf.* Issa Kohler-Hausmann, *Managerial Justice & Mass Misdemeanors*, 66 STAN. L. REV. (forthcoming 2014) (manuscript at 63, fig.9) (on file with author) (citing data that over fifty percent of NYC misdemeanor dispositions in 2011 were either adjournments in contemplation of dismissal or convictions to non-criminal offenses).

6 ROBERT C. BORUCHOWITZ ET AL., MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 11 (2009), *available at* http://www.nacdl.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=20808.

7 *See infra* Part III.A.

evidence.[8] Lower court defense attorneys are likely to be green, snowed under, and unwilling or unable to challenge the misdemeanor conviction machine.[9] Often defendants proceed without any counsel at all.[10] Facing prohibitively high bond, delay, repeated court appearances, and other process costs, most misdemeanor defendants submit to the institutional pressures to plead guilty at the earliest opportunity that allows them to return to their jobs and families.[11]

The misdemeanor prosecution system is problematic for many defendants, but especially so for those who are not United States citizens. For many immigrants, a conviction for a minor offense, despite resulting in minimal punitive consequences under state law, leads to detention, deportation, and bars to reentry. Turnstile jumping, petty shoplifting, and misdemeanor marijuana possession, among many other low-level offenses, can trigger deportation, sometimes with almost no possibility of discretionary relief. Thus, defense counsel (if provided at all) must ascertain whether the plea offered by the prosecutor raises deportation or other negative immigration consequences, and if so, attempt to negotiate a better bargain.[12] But heavy misdemeanor dockets make thorough investigation of the client's circumstances difficult in general, and impossible at arraignment. Even where the immigration consequences for a particular defendant are clear, the structural norms endemic to the prosecution of petty offenses often foreclose effective negotiation of immigration-neutral dispositions, especially at the first court appearance.[13]

The current integration of immigration enforcement with criminal justice systems exacerbates some of these problems and creates additional complexities for noncitizens charged with minor crimes. Because Immigration and Customs Enforcement (ICE) now has the ability to screen criminal facilities in almost every jurisdiction through enforcement programs like Secure Communities and the Criminal Alien Program, detained noncitizens are increasingly likely to be placed under immigration "detainers" early in the criminal process.[14] Through these enforcement programs, ICE often detects immigrants at booking who may already be deportable for civil immigration violations or prior criminal history. Noncitizens marked by immigration detainers are more likely to remain in custody during the pendency of their criminal

8 *See infra* Part III.

9 *See infra* Part III.B.2.

10 *See infra* Part III.A.

11 *See infra* Part III.

12 *See infra* Part II.

13 *See infra* Part III.B.

14 *See infra* Part I.B (discussing the integration of federal immigration enforcement with state and local criminal justice systems).

proceedings.[15] These presumptively deportable noncitizens will face removal proceedings regardless of the outcome of their criminal cases, and the prospect of discretionary relief from removal can be very difficult to assess without the assistance of an immigration expert. As a result, such defendants often believe it futile and not worth the cost to contest minor criminal charges while detained, even if they are innocent, have strong defenses, or have been arrested through racial profiling or other constitutional rights violations.[16]

The integration of immigration enforcement programs also influences the plea-bargain incentives of noncitizens not yet subject to immigration detainers who cannot make bail.[17] Because prosecutors often make plea offers at the defendant's first appearance in low-level cases, noncitizens willing to take the deal may be able to exit the system without ICE detection. The risk that deportation will ensue if a conviction is fought or delayed puts tremendous pressure on potentially removable noncitizens to take almost any plea offer that avoids contact with ICE, regardless of the future immigration problems that may be triggered by the conviction, the strength of the prosecutor's case, or even their own culpability.[18] Even lawfully present noncitizens face this dilemma where the misdemeanor case might end with a deportable conviction, at which point ICE will take custody and initiate removal proceedings.

Only recently has much attention been focused on misdemeanor prosecutions in this country, and even now there are but a few commentators shedding light on a system that is at once pervasive and far removed from the popular perception of how criminal convictions are obtained.[19] The particular crisis facing noncitizens arrested for petty offenses, however, remains unexplored.[20]

---

15 *See infra* Part III.C.

16 *See infra* Part III.C.2.

17 Already prohibitively high for most misdemeanants, bail in many jurisdictions may be increased if the court or prosecutor is aware the defendant is a noncitizen. *See* Gabriel J. Chin, *Illegal Entry as Crime, Deportation as Punishment: Immigration Status and the Criminal Process*, 58 UCLA L. REV. 1417, 1423 (2011). *See generally* Part III.B.3.

18 *See infra* Part III.C.1.

19 *See, e.g.*, Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461 (2007); K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271 (2009); John D. King, *Procedural Justice, Collateral Consequences, and the Adjudication of Misdemeanors in the United States*, *in* THE PROSECUTOR IN TRANSNATIONAL PERSPECTIVE 20 (Erik Luna & Marianne L. Wade eds., 2012); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313 (2012); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277 (2011). Although this vibrant misdemeanor literature is largely quite recent, the significance of petty offense prosecutions in the criminal justice system has received intermittent interest. *See, e.g.*, MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT 9–11 (1979); ROSCOE POUND, CRIMINAL JUSTICE IN AMERICA 190–91 (1930); PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 128 (1967), *available at*

To be sure, commentators have increasingly criticized the harshness of current immigration laws, which impose banishment with little consideration of mitigating factors, even where the underlying offense is not serious.[21] The Supreme Court has also acknowledged the severity of deportation as the nearly inevitable result of many minor criminal convictions, taking the opportunity in *Padilla v. Kentucky* to endorse "creative[]" plea bargains, crafted to avoid harsh immigration consequences in appropriate cases.[22] But neither the Court nor the literature has adequately appreciated the dire situation facing the noncitizen trapped at the intersection of expansive, aggressively enforced federal immigration laws and state petty-offense processing. This Article explores the impact of these forces on misdemeanor defendants and the ramifications for current deportation policy, criminal justice systems, and communities.

Part I describes how recent changes to immigration law have expanded the range of criminal offenses leading to deportation and other immigration consequences while at the same time curbing the possibility of post-conviction discretionary relief at both state and federal levels. As the proliferation of federal enforcement initiatives at various access points in the state criminal justice system increases the pipeline from criminal arrests to federal removal proceedings, the

---

https://www.ncjrs.gov/pdffiles1/nij/42.pdf; Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603 (1956).

20 There are a few notable exceptions. *See* Chin, *supra* note 17 (describing generally how state criminal process laws take immigration status into account in ways that sometimes disadvantage noncitizens); Alice Clapman, *Petty Offenses, Drastic Consequences: Toward a Sixth Amendment Right to Counsel for Noncitizen Defendants Facing Deportation*, 33 CARDOZO L. REV. 585 (2011) (arguing that noncitizens facing petty charges that may lead to deportation must be provided with counsel). But even these articles do not thoroughly explore the specific challenges facing noncitizens prosecuted in the lower criminal courts. In particular, the effect of the immigration enforcement programs on noncitizens' plea-bargain choices has garnered no academic focus whatsoever.

21 *See, e.g.*, Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827, 1843–44 (2007) (discussing the rise of punitive penalties relating to immigration violations); Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th "Pale of Law,"* 29 N.C. J. INT'L L. & COM. REG. 639, 651–52 (2004) ("[W]e live in a time of extreme 'vigor, efficiency, and strictness' as to deportation of non-citizens convicted of crimes, due to nearly two decades of sustained attention to this issue." (footnote omitted)); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 482–86 (2007) (discussing the increasingly severe immigration consequences that follow from noncitizens' criminal convictions); William G. Paul, *America's Harsh and Unjust Immigration Laws*, USA TODAY MAGAZINE, July 1, 2000, at 14 (arguing that current immigration law in America is unjust and punishes noncitizens with deportation for minor offenses in a system that does not meet due process standards).

22 130 S. Ct. 1473, 1486 (2010); *see also* Vartelas v. Holder, 132 S. Ct. 1479, 1492 n.10 (2012) ("Armed with knowledge that a guilty plea would preclude travel abroad, aliens like Vartelas might endeavor to negotiate a plea to a nonexcludable offense—in Vartelas' case, *e.g.*, possession of counterfeit securities . . . .").

resulting scheme is one in which petty convictions, or mere petty arrests, frequently lead to banishment.

Part II turns to the Supreme Court's suggestion in *Padilla* that the institutional actors in state criminal proceedings might appropriately mitigate the current federal immigration scheme in the minor cases where deportation seems most disproportional. Part II then briefly outlines the options available to "creatively" structure pleas to avoid negative immigration consequences.

As Part III demonstrates, however, in the petty cases where the disparity between the underlying offense and the deportation consequence is greatest, entrenched institutional norms frustrate the sort of negotiation for immigration-safe dispositions envisioned by the *Padilla* Court. Hasty, ill-informed pleas, with little individualized equitable consideration, are par for the course whether counsel is appointed or not. And in the thousands of jurisdictions where ICE has access to state defendants, even informed noncitizens take "bad" pleas, motivated more by the desire to avoid contact with immigration authorities than by the strength of the prosecutor's case.

Part IV considers the implications of this analysis for deportation policy and criminal justice. Because misdemeanor plea bargaining usually does not adequately account for disproportionate immigration consequences, other measures remain necessary to address the disparity between the minor offenses and the severity of deportation as an automatic consequence. Critically, misdemeanor convictions have become increasingly unreliable indicators of guilt, especially where the integration of immigration enforcement with the state criminal apparatus makes fighting the charges seem too risky or futile. Part V assesses a few possibilities for reform that might begin to address the compromised integrity of both federal and state systems.

I. AN OVERVIEW OF CURRENT IMMIGRATION ENFORCEMENT AGAINST NONCITIZENS CHARGED WITH MINOR CRIMES

The Obama Administration, like the Bush and Clinton Administrations before it, prioritizes the apprehension and removal of noncitizens with criminal history, and particularly those convicted of serious offenses.[23] But although the federal government has increased

[23] *See* Memorandum from John Morton, Dir., U.S. Dep't of Homeland Sec., to All ICE Employees, Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens (Mar. 2, 2011) [hereinafter Morton, *Enforcement Priorities Memo*], *available at* http://www.ice.gov/doclib/foia/prosecutorial-discretion/civil-imm-enforcement-priorities_app-detn-reml-aliens.pdf (outlining the government's enforcement priorities). The Clinton Administration initiated the first major concerted effort to deport noncitizens on criminal

deportations of noncitizens with some criminal history in the last ten years,[24] very few of the total 400,000 noncitizens deported annually are removed on the basis of serious offenses.[25] Rather than targeting the worst offenders, enhanced immigration enforcement appears primarily to yield increased numbers of noncitizens with only minor convictions or no criminal record at all.

A. *The Expanding Immigration Consequences of Minor Convictions*

Lawfully present noncitizens become removable when their convictions match up with one of the Immigration and Nationality Act's (INA) categories of deportable offenses.[26] In the 1990s, Congress widely expanded these categories and sharply constricted opportunities for discretionary post-conviction relief from removal at both the federal and state levels.[27] The broader categories discussed below—aggravated felonies, crimes involving moral turpitude, and controlled substance convictions—now sweep in many minor offenses.

When Congress first enacted the aggravated felony removal category in 1988, only three serious crimes were included: murder, drug trafficking, and firearms trafficking.[28] The current list—now at twenty-eight offenses,[29] some of which create further sub-categories[30]—includes

grounds. *See* Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131, 1135–36 (2002).

24 The Department of Homeland Security (DHS) reports that it removed approximately 188,000 "criminal aliens" in 2011. OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SEC., ANNUAL REPORT, IMMIGRATION ENFORCEMENT ACTIONS: 2011, at 1, 6 tbl.7 (2011), *available at* http://www.dhs.gov/sites/default/files/publications/immigration-statistics/enforcement_ar_2011.pdf. To put that number in historical perspective, consider that from 1908 to 1980 the United States deported a *total* of 56,669 noncitizens based on criminal history. IMMIGRATION & NATURALIZATION SERV., U.S. DEP'T OF JUSTICE, 1997 STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE 187 tbl.67, *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/1997YB.pdf (indicating that between 1908 and 1980, 48,330 noncitizens were deported for "criminal violations" and another 8,339 were deported for "narcotics violations").

25 Spencer S. Hsu & Andrew Becker, *Immigration Officials Set Quotas to Boost Deportation Numbers*, WASH. POST, Mar. 27, 2010, at A04 (discussing the disparity between the Department of Homeland Security's directive that enforcement should focus on "the most dangerous illegal immigrants" and the practices of lower-ranked ICE officials).

26 *See* Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1938–41 (2000).

27 *See* Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (codified as amended in scattered sections of 8, 18, and 28 U.S.C.); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of the U.S. Code); Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended in scattered sections of 8 U.S.C.).

28 *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 7342, 7344(a), 102 Stat. 4181, 4469–71 (codified as amended at 8 U.S.C. §§ 1101(a)(43), 1227(a)(2)(A)(iii) (2012)).

29 8 U.S.C. § 1101(a)(43)(A)–(U).

crimes that are neither aggravated nor felonies under criminal law.[31] Misdemeanor drug possession with a one-year sentence can qualify as an aggravated felony,[32] as does a year of probation with a suspended sentence for pulling hair—a misdemeanor under Georgia law.[33] Convictions for selling ten dollars worth of marijuana, theft of a ten-dollar video game, shoplifting fifteen dollars worth of baby clothes, and forging a check for less than twenty dollars have all been held to be aggravated felonies.[34] Aggravated felonies trigger mandatory detention, deportation without the possibility of almost all forms of discretionary relief, including asylum[35] and cancellation of removal,[36] and a permanent bar on lawful reentry.[37]

Another deportation category that includes relatively minor state offenses is the crime involving moral turpitude (CIMT). Under current law, so long as a sentence of one year or more *could* be imposed, a lawful permanent resident (LPR) is deportable for a CIMT conviction within five years of admission, even if the actual punishment levied consists only of a fine or community service.[38] An LPR with two CIMTs is deportable regardless of whether either was committed within five years of admission.[39] CIMTs include theft of services offenses like turnstile jumping,[40] misdemeanor indecent exposure,[41] petty shoplifting offenses,[42] and other crimes that states do not significantly punish.[43]

---

30 *See, e.g.*, 8 U.S.C. § 1101(a)(43)(F) (crimes of violence as defined in 18 U.S.C. § 16 "for which the term of imprisonment [is] at least one year"); *id.* § 1101(a)(43)(G) (theft offenses "for which the term of imprisonment [is] at least one year").

31 *See generally* Andrew Moore, *Criminal Deportation, Post-Conviction Relief and the Lost Cause of Uniformity*, 22 GEO. IMMIGR. L.J. 665, 673–75 (2008) (citing scholarship critical of the aggravated felony category, and summarizing some of the litigation produced by its broad categories).

32 *See* Carachuri-Rosendo v. Holder, 130 S. Ct. 2577, 2589–90 (2010) (holding that a simple possession misdemeanor offense may qualify as an aggravated felony if charged as a recidivist offense).

33 *See, e.g.*, Anthony Lewis, *Abroad at Home: "This Has Got Me in Some Kind of Whirlwind,"* N.Y. TIMES, Jan. 8, 2000, at A13 (describing a woman facing deportation on the basis of a misdemeanor battery conviction for pulling another woman's hair in a quarrel over a man a decade before the aggravated felony law was passed).

34 *See* Brief for Asian American Justice Center et al. as Amici Curiae Supporting Petitioner at 8–9, Padilla v. Kentucky, 130 S. Ct. 1473 (2010) (No. 08-651).

35 *See* 8 U.S.C. § 1158(b)(2)(A)–(B).

36 *See id.* §§ 1229a(a)(3), (b)(1)(C).

37 *See id.* § 1182(a)(9)(A)(i) ("Any alien . . . who again seeks admission . . . at any time in the case of an alien convicted of an aggravated felony[] is inadmissible.").

38 *See id.* § 1227(a)(2)(A)(i).

39 *See id.* § 1227(a)(2)(A)(ii).

40 *See* Mojica v. Reno, 970 F. Supp. 130, 137 (E.D.N.Y. 1997).

41 *See In re* Cortes Medina, 26 I. & N. Dec. 79 (B.I.A. 2013) (holding that CAL. PENAL CODE § 314(1) (2012), which includes misdemeanor-level indecent exposure violations, is a CIMT).

42 Da Rosa Silva v. Immigration & Naturalization Serv., 263 F. Supp. 2d 1005, 1011 (E.D. Pa. 2003) (holding that shoplifting is a crime constituting moral turpitude).

43 *See, e.g.*, N.J. STAT. ANN. § 2C:21-2.4 (West 2013) (classifying the offense of passing bad checks as a "disorderly persons offense"); Baer v. Norene, 79 F.2d 340, 341 (9th Cir. 1935)

LPRs deportable under this provision also tend to be foreclosed from establishing the seven years residency requirement for discretionary relief.[44]

Finally, although many states punish misdemeanor drug offenses only with small fines,[45] any controlled substance offense makes lawfully present noncitizens deportable, with the narrow exception of a single conviction for simple possession of thirty grams or less of marijuana.[46] According to the Department of Homeland Security, drug crimes (including manufacturing, possession, and distribution offenses) accounted for twenty-three percent of all criminal deportations in 2011,[47] and an even higher percentage in prior years.[48] Additionally, the INA deems noncitizens (including LPRs) with any controlled substance violations who sojourn abroad, however briefly, to be seeking entry upon return.[49] In other words, the noncitizen is stripped of lawful status and treated as if requesting admission to the United States for the first time.[50] There is no petty offense exception; no waiver available; no consideration of length of residence or strength of community ties; and the returning LPR may be subject to mandatory detention.[51]

(describing check forgery as an offense that involves moral turpitude); Susan L. Pilcher, *Justice Without a Blindfold: Criminal Proceedings and the Alien Defendant*, 50 ARK. L. REV. 269, 312–13 (1997) (explaining that passing bad checks is a crime that may involve moral turpitude under deportation law).

44 Morawetz, *supra* note 26, at 1941 (observing that commission of a crime stops accumulation of seven years residence for purposes of qualifying for cancellation of removal). *See generally infra* notes 57–60 and accompanying text (discussing the criteria for cancellation of removal).

45 *See, e.g.*, CAL. HEALTH & SAFETY CODE § 11357(b) (West 2012); COLO. REV. STAT. § 18-18-406(1) (2012); MINN. STAT. § 152.027(4) (2012); NEV. REV. STAT. § 453.336 (2011); N.J. STAT. ANN. § 2C:35-10(a)(4) (West 2013); N.Y. PENAL LAW §§ 221.05, .10 (McKinney 2013).

46 8 U.S.C. § 1227(a)(2)(B)(i) (2012).

47 OFFICE OF IMMIGRATION STATISTICS, *supra* note 24, at 6 tbl.7.

48 *See id.* at 6 tbl.7 (showing that drug offenses accounted for over twenty-five percent of removals in 2010 and almost thirty percent in 2009).

49 Vartelas v. Holder, 132 S. Ct. 1479,1483 (2012) (recognizing that after the 1996 legislation a lawful permanent resident with a controlled substance offense who "return[s] from a sojourn abroad, however brief, may be permanently removed from the United States" (citing 8 U.S.C. §§ 1101(a)(13)(C)(v), 1182(a)(2))).

50 One of my former clients, an LPR of forty years, was detained without bond and put into removal proceedings following a thirteen-day European cruise with his family. He had previously been arrested and issued a Desk Appearance Ticket for possession of marijuana, to which he pled guilty and paid a twenty-five dollar fine. ICE alleged that the offense stripped him of his lawful status and subjected him to the controlled substance inadmissibility ground, for which there is no waiver.

51 The mandatory detention rule applies if the returning LPR was released from penal custody for the offense any time after October 8, 1998. *See Vartelas*, 132 S. Ct. at 1490–92 (holding that the rule subjecting a returning resident with a controlled substance offense to the INA's inadmissibility grounds is not retroactive to convictions entered before the statutory enactment in 1996); MARY E. KRAMER, IMMIGRATION CONSEQUENCES OF CRIMINAL ACTIVITY: A GUIDE TO REPRESENTING FOREIGN-BORN DEFENDANTS 150, 313 (4th ed. 2009).

Beyond these broad categories of removable convictions, the federal government expands the deportation consequences of criminal offenses in other ways. For instance, federal law treats deferred adjudication programs as convictions for immigration purposes if the defendant must plead guilty to qualify.[52] This rule primarily affects whether diversionary alternatives for noncitizens involved in minor drug or domestic violence offenses will still result in deportation.[53]

While expanding removable offense categories over the last two decades, Congress has significantly curtailed the opportunities for both state and federal agency officials to exercise post-conviction discretion to mitigate immigration consequences where warranted.[54] Before 1996, immigration judges were authorized by section 212(c) of the INA to determine whether deportation was warranted in individual cases based on factors like the nature of the offense, the length of the noncitizen's residence, the hardship to family members that would be caused by the noncitizen's deportation, evidence of rehabilitation, and so forth.[55] As the Supreme Court noted in *Immigration and Naturalization Service v. St. Cyr*, more than half of all deportable residents seeking 212(c) relief prevailed.[56] Cancellation of removal, the closest current analogue, is available to LPRs only if they have lawfully resided in the United States for at least seven years.[57] As noted, any conviction that federal law defines as an aggravated felony (even if only a misdemeanor under state law) bars cancellation of removal relief, regardless of the length of lawful residence or the strength of the equities.[58]

---

52 *See* COMM. ON CRIMINAL JUSTICE OPERATIONS, N.Y.C. BAR, THE IMMIGRATION CONSEQUENCES OF DEFERRED ADJUDICATION PROGRAMS IN NEW YORK CITY 1–4 (2007), *available at* http://www.nycbar.org/pdf/report/Immigration.pdf; Jason A. Cade, *Deporting the Pardoned*, 46 U.C. DAVIS L. REV. 355, 380–81, 394–96 (2012) (discussing how federal immigration law interferes with states' goals in offering deferred adjudication programs).

53 Many states require a plea of guilty before a defendant can enter a diversionary program. *See, e.g.*, GA. CODE ANN. § 16-13-2 (2012) (declaring that the drug treatment diversionary program requires a guilty plea); MICH. COMP. LAWS § 600.1068 (2012) (same); *id.* § 769.4a (declaring that the domestic violence diversionary program requires a guilty plea); N.Y. CRIM. PROC. LAW § 216.05 (McKinney 2013) (declaring that drug treatment diversionary program requires a guilty plea); OKLA. STAT. tit. 43A § 3-452 (2012) (same).

54 *See, e.g.*, Padilla v. Kentucky, 130 S. Ct. 1473, 1479–80 (discussing the elimination of 212(c) relief and JRADs).

55 *See* Immigration and Nationality Act of 1952, Pub. L. No. 82–414, § 212(c), 66 Stat. 163, 187, *repealed by* IIRIRA, Pub. L. No. 104-208, div. C, § 304(b), 110 Stat. 3009-546, 3009-597 (1996).

56 533 U.S. 289, 295–96 & n.5 (2001).

57 8 U.S.C. § 1229b(a) (2012). Once noncitizens are placed into removal proceedings, or commit certain offenses, they can no longer accrue time in the United States qualifying them for cancellation of removal. *See id.* § 1229b(d)(1).

58 *Id.* § 1229b(a)(3).

For non-LPRs, the requirements for discretionary relief from removal are even more demanding.[59] Furthermore, misdemeanors can foreclose a non-LPR's eligibility for temporary relief programs such as Temporary Protected Status (TPS) or Deferred Action for Childhood Arrivals (DACA). TPS is statutorily available to noncitizens from designated countries on the basis of severe natural disasters or political strife.[60] The Obama Administration implemented DACA on August 15, 2012 to allow certain young people to avoid deportation and work lawfully for two years, subject to renewal.[61] Additionally, deported noncitizens with a criminal history, even if very minor, generally have great difficulty lawfully returning to the United States even if otherwise eligible for an immigrant visa.

Congress has also repealed the authority that it previously granted state criminal judges to make a recommendation against deportation at the time of sentencing.[62] Though sparingly used, Judicial Recommendations Against Deportation (JRADs) were consistently interpreted as giving the sentencing judge "conclusive authority to decide whether a particular conviction should be disregarded as a basis for deportation."[63] Similarly, some federal agencies and courts have interpreted federal immigration law to limit the effect of executive pardons or judicial expungements on the immigration consequences of convictions.[64] Elsewhere I have argued that Congress did not clearly intend to override the states' sovereign authority to determine the continuing validity of their own convictions through all of these mechanisms.[65] But the fact remains that under current law there is little potential for discretionary post-conviction processes in either the state or the federal system to avert deportation on the basis of relatively minor crimes.

---

59 *See id.* § 1229b(b)(1) (requiring ten years of physical presence and a showing of "exceptional and extremely unusual hardship" to qualifying family members).

60 *See id.* § 1254 (describing requirements for Temporary Protected Status); *id.* § 1254a(c)(2)(B)(i) (providing that noncitizens are ineligible for Temporary Protected Status if convicted of two misdemeanors). *But cf.* 8 C.F.R. § 244.1 (2012) ("[A]ny crime punishable by imprisonment for a maximum term of five days or less shall not be considered a felony or misdemeanor.").

61 *See Consideration of Deferred Action for Childhood Arrivals*, U.S. CITIZENSHIP & IMMIGRATION SERVS., http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=f2ef2f19470f7310VgnVCM100000082ca60aRCRD&vgnextchannel=f2ef2f19470f7310VgnVCM100000082ca60aRCRD (last updated Jan. 18, 2013) (outlining eligibility requirements for DACA and explaining that a youth with three or more misdemeanors or a single "significant" misdemeanor becomes ineligible for the program).

62 Padilla v. Kentucky, 130 S. Ct. 1473, 1479–80 (2010) (discussing the fact that from 1917 to 1990, Congress authorized sentencing judges, in either state or federal prosecutions for crimes involving moral turpitude, to make a recommendation that the alien not be deported).

63 *Id.* at 1479 (quoting Janvier v. United States, 793 F.2d 449, 452 (2d Cir. 1986)); Taylor & Wright, *supra* note 23, at 1148 (noting JRADs were not widely used even when authorized).

64 *See generally* Cade, *supra* note 52, at 414.

65 *Id.* at 406–12.

In sum, even minor convictions may trigger removal for lawfully present noncitizens or foreclose discretionary paths to lawful status that would otherwise be available to undocumented residents. Consequently, the integrity of the criminal justice process is critical to ensure that the resulting immigration consequences are justified.

B. *The Integration of Immigration Enforcement with the Criminal Justice System*

Despite Congress's multiplication of the criminal offenses that trigger deportation over the last fifteen years, the actual apprehension and removal of noncitizens with criminal records has presented a challenge, in part because the vast majority of criminal prosecutions occur in state and local courts.[66] In the last decade, and particularly the last five years, the federal government has attempted to meet the challenge of enforcing immigration law against noncitizens with non-federal convictions through a number of programs that increase Immigration and Customs Enforcement ("ICE") access to state and local defendants.[67] Federal funding for these interior enforcement programs reached $690.2 million in 2011, thirty times the amount appropriated in 2004.[68]

ICE currently operates three major enforcement initiatives to identify noncitizens who encounter state and local criminal justice systems for possible criminal grounds of removal or immigration violations: the Criminal Alien Program, Secure Communities, and certain section 287(g) programs. Although the various programs function differently, each relies to some degree on state and local law enforcement to facilitate ICE's initiation of removal proceedings against noncitizen arrestees.

---

66 *See* Peter H. Schuck, *Removing Criminal Aliens: The Pitfalls and Promises of Federalism*, 22 HARV. J.L. & PUB. POL'Y 367 (1999) (describing the historical "failures" of the immigration system at identifying and removing noncitizens convicted of crimes in state and local courts). In 2012, for example, the government reported a total of 167,496 new federal prosecutions. *Custom Reports—TRAC Data Interpreter, Prosecutions for Fiscal Year 2012*, TRAC REPORTS, http://trac.syr.edu/cgi-bin/product/interpreter.pl?p_stat=fil&p_series=annual (last visited Feb. 13, 2013). In contrast, each of the fifty states typically prosecutes more than 100,000 cases per year, and larger states like New York and California prosecute as many as ten times that amount. *See generally State Court Caseloads Tables 2010, Criminal—Total Caseloads*, COURT STATISTICS PROJECT, http://www.courtstatistics.org/Other-Pages/~/media/Microsites/Files/CSP/SCCS/2010/Total_Criminal_Caseloads.ashx (last visited Feb. 8, 2013).

67 *See* IMMIGRATION CUSTOMS ENFORCEMENT, U.S. DEP'T OF HOMELAND SEC., FACT SHEET: ICE AGREEMENTS OF COOPERATION IN COMMUNITIES TO ENHANCE SAFETY AND SECURITY (2008), *available at* http://www.ice.gov/doclib/news/library/factsheets/pdf/access.pdf.

68 *See* MARC R. ROSENBLUM & WILLIAM A. KANDEL, CONG. RESEARCH SERV., R42057, INTERIOR IMMIGRATION ENFORCEMENT: PROGRAMS TARGETING CRIMINAL ALIENS 25 (2012), *available at* http://www.fas.org/sgp/crs/homesec/R42057.pdf.

The Criminal Alien Program (CAP) includes various systems for identifying and initiating removal proceedings against deportable noncitizens. CAP's primary function is to screen foreign-born convicts and detainees in every prison and jail throughout the country.[69] In addition to conducting in-person interviews inside prisons and jails, CAP's 7854 employees interview inmates by videoconference, check inmate roster data provided by correctional departments against immigration databases, and perform other operations.[70] If it appears an incarcerated defendant may be deportable following this screening, ICE will issue an "immigration detainer," which asks law enforcement to confine the person for up to another forty-eight hours beyond the time he would have been released, until ICE has a chance to assume custody.[71] In Part III of this Article I discuss the influence of detainers on plea bargaining, but it is worth observing here that the applicable statute and regulations do not require any evidentiary standard for their issuance.[72]

The Secure Communities program is even more intertwined with law enforcement. Introduced by President Bush in 2008 and expanded under President Obama,[73] Secure Communities capitalizes on the potential for electronic data sharing across federal agencies. When local police in a Secure Communities jurisdiction submit arrestees' fingerprints to a Federal Bureau of Investigation (FBI) database to check for criminal background and outstanding warrants, the FBI then forwards the prints to DHS where they are screened for criminal history

---

69 *Id.* at 14.

70 *Id.* at 14–15; *see also* Declaration of Jamison Matuszewski ¶¶ 18–22, at 6–8, Am. Immigration Council v. Dep't of Homeland Security, No. 12-00355 (D. Conn. July 12, 2012) [hereinafter Matuszewski Declaration], *available at* http://www.legalactioncenter.org/sites/default/files/docs/lac/27-2_Matuszewski_Declaration_%282%29.pdf.

71 "A detainer serves to advise another law enforcement agency that the Department seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien." 8 C.F.R. § 287.7(a) (2012). The forty-eight hour period is not discounted by holidays or weekends. *Id.* § 287.7(d). Chris Lasch has analyzed the scope of statutory authority for immigration detainers in two informative articles. *See* Christopher N. Lasch, *Enforcing the Limits of the Executive's Authority to Issue Immigration Detainers*, 35 WM. MITCHELL L. REV. 164 (2008); Christopher N. Lasch, *Federal Immigration Detainers After* Arizona v. United States, 46 LOYOLA L.A. L. REV. (forthcoming 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2178524.

72 Immigration officers must only have a "reason to believe" that the arrestee is a noncitizen. 8 U.S.C. § 1357(a)(2) (2012); 8 C.F.R. § 287.7; *see also* Matuszewski Declaration, *supra* note 70, ¶ 22, at 8 ("[I]n FY2011 there were 701,473 'CAP encounters,' of which 221,122 resulted in arrests. An arrest occurs when an ICE agent believes, based on the totality of the circumstances, that the suspect is in violation of U.S. immigration law.").

73 AARTI KOHLI ET AL., CHIEF JUSTICE EARL WARREN INST. ON LAW & SOC. POL'Y, SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS 1 (2011), *available at* http://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf.

and immigration violations.[74] If the arrestee appears to be removable, ICE can issue a detainer.

Finally, a program enacted in 1996 under section 287(g) of the Immigration and Nationality Act, empowers the Department of Homeland Security (DHS) to train local law enforcement agents to investigate, apprehend, and detain deportable noncitizens.[75] Although only two states had entered into section 287(g) agreements in 2003,[76] ICE boasts partnerships under the program with thirty-nine law enforcement agencies in nineteen states as of December 31, 2012.[77] More than half of currently active section 287(g) agreements are jail enforcement programs, in which the deputized officers interview and screen foreign-born detainees using the same immigration databases as CAP agents.[78]

As a result of ramped up immigration enforcement efforts, the state-to-federal pipeline of deportable noncitizens has swelled tremendously over the last five years. Despite the little attention it has received, CAP appears to be the workhorse of the federal enforcement programs. CAP now actively screens in all federal and state correctional institutions and in 99.6% of county jails.[79] According to ICE, in 2011 there were 701,473 CAP "encounters" (interviews and data screening) leading to 221,122 immigration arrests.[80] The Congressional Research Service reports that CAP led to well over one million immigration arrests from 2007 to 2011.[81] The section 287(g) program, in contrast, identified about 200,000 potentially removable aliens in that same time

---

74 *See* ROSENBLUM & KANDEL, *supra* note 68, at 15.

75 *See Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, http://www.ice.gov/news/library/factsheets/287g.htm (last visited April 15, 2013) [hereinafter *Fact Sheet: Delegation of Immigration Authority*].

76 Michele Waslin, *Immigration Enforcement by State and Local Police: The Impact on the Enforcers and Their Communities*, *in* TAKING LOCAL CONTROL: IMMIGRATION POLICY ACTIVISM IN U.S. CITIES AND STATES 97, 102–03 (Monica W. Varsanyi ed., 2010) (stating that Florida and Alabama became the first states to enter into section 287(g) agreements, in 2002 and 2003, respectively).

77 *See Fact Sheet: Delegation of Immigration Authority*, *supra* note 75.

78 *See* ROSENBLUM & KANDEL, *supra* note 68, at 16.

79 *The Criminal Alien Program (CAP): Immigration Enforcement in Prisons and Jails*, AM. IMMIGRATION COUNCIL—IMMIGRATION POLICY CTR. (Feb. 1, 2013), http://www.immigrationpolicy.org/just-facts/criminal-alien-program-cap-immigration-enforcement-prisons-and-jails ("CAP boasts 100% screening to all sentenced inmates in Bureau of Prisons (BOP) facilities and all state correctional institutions and in FY 2012, according to the Criminal Alien Program Risk Assessment (CAPRA), 3,054 of 3,066 county jails (99.6%) received 100% screening."); *see also* ROSENBLUM & KANDEL, *supra* note 68, at 14–18.

80 *See* Matuszewski Declaration, *supra* note 70, ¶ 22, at 8.

81 *See* ROSENBLUM & KANDEL, *supra* note 68, at 25 tbl.6.

period.[82] In 2011, there were 33,180 arrests through section 287(g), a four year low.[83]

As of August 2012, Secure Communities was active in over 3074 jurisdictions in fifty states.[84] Due to its comparative efficiency, Secure Communities has quickly become the primary identifier of potentially deportable noncitizens, leading to 348,970 such identifications in 2011.[85] Because CAP and section 287(g) officers effectuate many (but not all) of the immigration arrests that follow identifications made through Secure Communities, the cumulative data of arrests across the three programs undoubtedly includes some double-counting.[86] Nevertheless, the programs mark huge numbers of noncitizens as potentially deportable. By the end of 2013, CAP and Secure Communities together will be able to screen 100% of the country's jails and prisons.[87]

Time and again the Obama administration has touted these enforcement initiatives as necessary for preventing crime and deporting serious criminals.[88] ICE's website asserts that programs like CAP and Secure Communities "focus[] federal resources on . . . identifying and removing high-risk criminal aliens."[89] According to Homeland Security Secretary Janet Napolitano, the federal government's enforcement policy "focus[es] on deporting the worst offenders, including national security risks, criminal convicts and those who repeatedly violate

---

82 *Id.*

83 *Id.* ICE requested $17 million dollars less funding for section 287(g) for FY2013 than it received in the prior four years, evidencing the shrinking priority placed on the program as compared to CAP and Secure Communities. *Id.* at 24 tbl.5.

84 *See* IMMIGRATION & CUSTOMS ENFORCEMENT, U.S. DEP'T OF HOMELAND SEC., ACTIVATED JURISDICTIONS (2012), *available at* http://www.ice.gov/doclib/secure-communities/pdf/sc-activated2.pdf. This is a dramatic increase since 2010, when Secure Communities was active in only 116 jurisdictions and sixteen states. *See* DET. WATCH NETWORK, FAMILIES FOR FREEDOM, IMMIGRANT DEF. PROJECT & NAT'L IMMIGRATION PROJECT OF THE NAT'L LAWYERS GUILD, DEPORTATION 101: A COMMUNITY RESOURCE ON ANTI-DEPORTATION EDUCATION AND ORGANIZING 9 (2010).

85 ROSENBLUM & KANDEL, *supra* note 68, at 25 tbl. 6. As the Congressional Research report notes, some of the arrest data across the programs is likely double-counted because the Secure Communities program identifies deportable noncitizens but does not make arrests itself. *Id.* at 26. Thus, arrests following Secure Communities identifications will often (but not always) be made by field officers in the CAP or section 287(g) programs. *Id.*

86 *Id.* at 26. Additionally, the same individual may be arrested or identified multiple times, leading to further over-counts. *Id.*

87 *Id.* at 15 (citing ICE's Congressional Budget Justifications for FY2013).

88 *See, e.g.*, Sam Dolnick, *In Change, Mayor Backs Obstacle to Deportation*, N.Y. TIMES, Oct. 1, 2011, at A19 ("[T]he Obama administration has placed a priority on deporting noncitizen criminals who pose a threat to the public, while focusing less on illegal immigrants who do not pose a threat."); President Barack Obama, Remarks on Comprehensive Immigration Reform in El Paso, Texas (May 10, 2011) ("We're focusing our limited resources and people on violent offenders and people convicted of crimes . . . ."), *available at* http://www.whitehouse.gov/the-press-office/2011/05/10/remarks-president-comprehensive-immigration-reform-el-paso-texas.

89 *See* IMMIGRATION CUSTOMS ENFORCEMENT, *supra* note 67, at 2.

immigration laws."[90] ICE spokeswoman Virginia Kice has defended immigration detainers on the grounds that they ensure that noncitizens with convictions "are not released back into the community to potentially commit more crimes."[91] The federal government has repeatedly made similar statements in press releases and Congressional hearings.[92]

In Part III.C, I discuss how the immigration jail enforcement programs can distort the plea-bargain incentives in minor cases. The point I wish to observe here is that despite the federal government's rhetoric, there is little evidence that such programs effectively target the worst offenders. Rather, most of the noncitizens placed into removal proceedings through the jail enforcement programs have only minor criminal convictions or no criminal record at all. In 2009, Homeland Security Secretary Napolitano's advisor issued a report finding the ICE initiatives had no discernible effect on the number of noncitizens with criminal history taken into custody, though they did increase apprehension of non-criminal immigrants.[93] Indeed, as the total number of arrests through these programs has increased each year since 2006, the proportion involving noncitizens with serious convictions has steadily declined while arrests of those without any criminal records have steadily risen.[94] Even within the group of individuals who enter

---

90 Julia Preston, *U.S. to Review Cases Seeking Deportations*, N.Y. TIMES, Nov. 17, 2011, at A1.

91 *See* Paloma Esquivel & Lee Romney, *Two L.A. Officials Target Deportation Program*, L.A. TIMES, May 26, 2011, at 3 (quoting Virginia Kice, a spokesperson for ICE).

92 *See, e.g.*, *Is Secure Communities Keeping Our Communities Secure?: Hearing Before the Subcomm. on Immigration Policy & Enforcement of the H. Comm. on the Judiciary*, 112th Cong. 11 (2011) (statement of Gary Mead, Exec. Assistant Dir. for Enforcement and Removal Operations, U.S. Immigration & Customs Enforcement), *available at* http://judiciary.house.gov/hearings/printers/112th/112-69_71404.PDF; U.S. Dep't of Homeland Security, Press Release, Sec. Napolitano's Remarks on Smart Effective Border Security and Immigration Enforcement (Oct. 5, 2011), *available at* http://www.dhs.gov/news/2011/10/05/secretary-napolitanos-remarks-smart-effective-border-security-and-immigration ("We established, as a top priority, the identification and removal of public safety and national security threats. To execute on this, we expanded the use and frequency of investigations and programs, like Secure Communities, that track down criminals and gang members on our streets and in our jails."); U.S. Immigration & Customs Enforcement, Press Release, ICE Unveils Sweeping New Plan to Target Criminal Aliens in Jails Nationwide (Mar. 28, 2008), *available at* http://www.ice.gov/news/releases/0803/080328washington.htm (describing Secure Communities as "an historic opportunity to transform immigration enforcement and improve public safety by focusing on those aliens who pose the greatest threats to our communities" (quoting Julie L. Myer, Assistant Secretary, U.S. Immigration & Customs Enforcement)).

93 DORA SCHRIRO, U.S. DEP'T OF HOMELAND SEC., IMMIGRATION AND CUSTOMS ENFORCEMENT: IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 12 (2009), *available at* http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf.

94 ROSENBLUM & KANDEL, *supra* note 68, at 32 ("[A]s the number of arrests [under the section 287(g) program] increased between FY2006 and FY2011, the proportions of arrests involving Level 1 criminal aliens declined, while those for noncriminal arrests increased. . . . Slightly over half of the aliens removed and returned as a result of Secure

deportation proceedings through the ICE enforcement programs following a criminal arrest, most have no criminal record, or only one or two misdemeanor convictions.[95] In 2011, for example, fifty-one percent of noncitizens arrested following identification by the section 287(g) program had no convictions, while twenty-one percent had only one or two misdemeanors.[96] By contrast, thirteen percent had three or more misdemeanors or one non-aggravated felony, and only sixteen percent of those identified through section 287(g) were in the government's highest criminal removal priority (those convicted of an aggravated felony or two or more regular felonies).[97] As for the removals and returns effectuated through the Secure Communities program in 2011, twenty-five percent had no criminal record, twenty-nine percent had one or two misdemeanors, twenty percent had three or more misdemeanors or one non-aggravated felony, and twenty-six percent had one aggravated felony or at least two regular felonies.[98] (It bears repeating that aggravated felonies include offenses that are neither felonious nor aggravated.[99]) Similar data does not appear to be publicly available for CAP.[100]

While the exercise of prosecutorial discretion in immigration court has the potential to play a significant role in how immigration law is enforced against noncitizens with minor criminal history, immigration prosecutors may lack sufficient incentives to exercise much discretion.[101] Further, the institutional culture of immigration officers

---

Communities have been Level 3 criminals . . . with the proportions . . . falling during each year for which data are available.").

95 *Id.* at 32 tbl.8 (showing statistics for arrests under the Secure Communities and section 287(g) programs by type of offense from fiscal year 2006 to fiscal year 2012).

96 *Id.*

97 *Id.*

98 *Id.*

99 *See supra* text accompanying notes 29–37. In both 2010 and 2011, around four percent or fewer of all noncitizens in deportation proceedings (not just those from the immigration enforcement programs) were alleged to be aggravated felons. *See Deportation Orders Sought in Immigration Court Based on Alleged Criminal Activity by Type*, TRAC IMMIGRATION, http://trac.syr.edu/immigration/reports/281/include/deportertype.html (last updated Mar. 28, 2012).

100 *See* Matuszewski Declaration, *supra* note 70, ¶ 23, at 8 ("Although ICE tracks the cumulative number of 'CAP encounters,' it does not have any supporting details that would allow it to identify the individuals encountered by CAP and retrieve their records, nor are any files identified as 'CAP files.'").

101 As Professor Nancy Morawetz has explained:

> In criminal cases the criminal prosecutor has to think about the strength of the evidence, the difficulty of proceeding with the case, and the prosecutorial priorities of the office. In contrast in immigration, it tends to be little work to have the case proceed in court. As a result, there are no institutional disincentives to having the immigration court dispose of the case. As a practical matter, once someone is in [removal] proceedings, it is easier for the ICE trial attorney to prove removal than it is to write a memo to get superiors to agree to exercise discretion.

and prosecutors is decidedly enforcement-oriented.[102] Indeed, although ICE Director John Morton issued two agency memoranda in 2011 providing guidelines for ICE officers and prosecutors to target serious criminal offenders,[103] there has been very little discernible change in policy on the ground, due at least in part to internal agency resistance.[104] In the year following the issuance of the Morton memos, ICE closed less than 1.5% of pending cases,[105] and the backlog of pending matters in immigration court continues to rise.[106]

It may be, of course, that the federal government's true priorities in implementing the enforcement programs differ from those expressed in its public statements.[107] And certainly the administration has made clear that ICE officers may continue to "pursue the removal of any alien unlawfully in the United States," although it has also emphasized that

---

Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 278 (2010) (alteration in original) (quoting Telephone Interview by Shoba Wadhia with Nancy Morawetz, Immigration Scholar and Professor, New York University (July 15, 2009)).

102 *See, e.g.*, Memorandum from James M. Chapparo, Dir., U.S. Immigration & Customs Enforcement, to Field Office Directors and Deputy Field Office Directors, U.S. Immigration & Customs Enforcement, Keep up the Good Work on Criminal Alien Removals (Feb. 22, 2010), *available at* http://media.washingtonpost.com/wp-srv/politics/documents/ICEdocument032710.pdf (encouraging ICE officers to put more noncitizens into removal proceedings through CAP regardless of criminal record).

103 *See* Morton, *Enforcement Priorities Memo*, *supra* note 23; Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, to Field Office Directors, Special Agents in Charge, and Chief Counsel, U.S. Immigration & Customs Enforcement, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens 4–5 (June 17, 2011), *available at* http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf.

104 *See* AM. IMMIGRATION LAWYERS ASS'N & AM. IMMIGRATION COUNCIL, HOLDING DHS ACCOUNTABLE ON PROSECUTORIAL DISCRETION 6–11 (2011), *available at* http://www.aila.org/content/default.aspx?docid=37615 (reporting that the majority of ground-level ICE officials admitted that they were not following the prosecutorial discretion guidelines in the Morton memoranda); Julia Preston, *Agents' Union Delays Training on New Policy on Deportation*, N.Y. TIMES, Jan. 8, 2012, at A15 (reporting that the National ICE Counsel—the union representing ICE agents—refused to allow their members to participate in prosecutorial discretion trainings).

105 *See* Meghan McCarthy, *'Prosecutorial Discretion' Barely Dents Immigration Case Backlog*, TUCSON SENTINEL (July 15, 2012), http://www.tucsonsentinel.com/local/report/071512_immig_cases/prosecutorial-discretion-barely-dents-immigration-case-backlog.

106 *See Immigration Court Backlog Tool*, TRAC IMMIGRATION, http://trac.syr.edu/phptools/immigration/court_backlog (last visited Feb. 24, 2013) (reporting that the backlog rose from 297,551 in September 2011 to 325,044 in September 2012).

107 In an important empirical study of the county-by-county roll-out of Secure Communities, Adam Cox and Thomas Miles present data that undercuts the government's claim that the program's focus is on reducing crime. Their analysis demonstrates that the size of a county's Hispanic population (even controlling for other variables like the foreign-born population or proximity to the border), rather than the county's crime rates, was the most reliable indicator for early Secure Communities activation. *See* Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. CHI. L. REV. (forthcoming 2013) (manuscript at 102–03, 122–40), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2109820.

"attention to those aliens should not displace or disrupt the resources needed to remove aliens who are a higher priority."[108]

In any event, the upshot is that the federal government's rhetoric—that it focuses immigration enforcement on the most serious offenders—doesn't map well onto the reality. Instead, the expansion of removal categories, followed by more aggressive immigration enforcement initiatives, appears to have primarily facilitated increased removals of noncitizens with convictions for minor offenses, including misdemeanors, or no criminal history. Dragnet jail enforcement programs easily sweep up enough deportable noncitizens who encounter criminal justice systems, whether or not they have serious convictions, to max-out the federal government's capacity of removing 400,000 noncitizens per year.[109]

As I argue below, the expanded apprehension of deportable noncitizens with little or no criminal history comes at other, perhaps unforeseen costs. By imposing onerous process costs and skewing plea-bargain incentives in minor cases, the current implementation of jail enforcement programs may undermine the integrity of both misdemeanor convictions and immigration consequences imposed on the basis of minor offenses.

II. *PADILLA V. KENTUCKY* AND PLEA BARGAINING FOR IMMIGRATION-SAFE OUTCOMES

The harsh, unforgiving consequences of the immigration laws enacted in the 1990s, especially for noncitizens convicted of crimes, have become increasingly apparent.[110] Even the Supreme Court has acknowledged the severity of deportation as an unavoidable penalty for relatively minor offenses, taking the opportunity in *Padilla v. Kentucky* to suggest that defendants and prosecutors fashion pleas to avoid

---

108 Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, to All ICE Employees, Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens (June 30, 2010), *available at* https://www.ice.gov/doclib/detention-reform/pdf/civil_enforcement_priorities.pdf.

109 *See* Morton, *Enforcement Priorities Memo*, *supra* note 23, at 1 (stating that the federal immigration agencies have institutional capacity to remove about 400,000 noncitizens per year); *cf.* Hiroshi Motomura, *The Discretion that Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1842–49 (2011) (arguing that the devolution of immigration arrest authority to state and local officials will tend to subvert the federal government's ability to set enforcement priorities).

110 *See, e.g.*, Chacón, *supra* note 21, at 1844–45 (discussing the rise of punitive penalties relating to immigration); Kanstroom, *supra* note 21, at 651–52 ("[W]e live in a time of extreme 'vigor, efficiency, and strictness' as to deportation of non-citizens convicted of crimes, due to nearly two decades of sustained attention to this issue."); Legomsky, *supra* note 21, at 482–86 (discussing the increasingly severe immigration consequences that follow from noncitizens' criminal convictions).

deportation in appropriate cases.[111] This Part briefly discusses the *Padilla* decision and provides examples of ways that plea bargains can be structured to avoid immigration consequences.

A. *The* Padilla *Decision*

In *Padilla*, the Court held that the Sixth Amendment requires defense counsel to advise noncitizen defendants about the deportation consequences of a guilty plea.[112] But the Court also anticipated that its rule would improve the substantive immigration outcomes for noncitizen defendants, observing that "informed consideration" of the immigration penalties of a conviction may allow the parties to "plea bargain creatively . . . in order to craft a conviction and sentence that reduce the likelihood of deportation."[113] In other words, the Court endorsed explicit bargaining in state criminal proceedings to mitigate some of the harshness of the current federal immigration scheme.[114]

Academics and advocates have hailed *Padilla* as a watershed decision.[115] The decision's Sixth Amendment implications have already generated a voluminous body of scholarship.[116] Few commentators, however, have evaluated the *Padilla* Court's observation that the interests of the parties in criminal proceedings converge to facilitate plea

---

111 Padilla v. Kentucky, 130 S. Ct. 1473, 1481–86 (2010); *see also* INS v. St. Cyr, 533 U.S. 289, 291 (2001) (noting that defense attorneys may be able to negotiate pleas that avoid deportation).

112 *Padilla*, 130 S. Ct. at 1478. *But see* Chaidez v. United States, 133 S. Ct. 1103, 1113 (2013) (holding that *Padilla v. Kentucky*'s conclusion that the Sixth Amendment requires defense attorneys to inform criminal defendants of the deportation risks of guilty pleas does not apply retroactively to cases already final on direct review).

113 *Padilla*, 130 S. Ct. at 1486; *see also* Darryl K. Brown, *Why* Padilla *Doesn't Matter (Much)*, 58 UCLA L. REV. 1393, 1395 (2011) ("The majority opinion predicts and intends that the *Padilla* rule will change the substantive outcomes of plea bargaining between prosecutors and the defense . . . .").

114 Of course, *Padilla* does not constitutionally require defense counsel to protect her client from negative immigration consequences, only to apprise the defendant of the deportation risks of a plea or trial.

115 *See, e.g.*, Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1118 (2011) ("The U.S. Supreme Court's decision last year in *Padilla v. Kentucky* marks a watershed in the Court's approach to regulating plea bargains."); Jenny Roberts, *Proving Prejudice, Post*-Padilla, 54 HOW. L.J. 693, 694 (2011) (describing *Padilla* as "monumental for ineffective-assistance jurisprudence").

116 *See, e.g.*, Lindsay C. Nash, *Considering the Scope of Advisal Duties Under* Padilla, 33 CARDOZO L. REV. 549, 561–70 (2011) (discussing the contours of the Sixth Amendment duty when the deportation consequences are not clear); Yolanda Vázquez, *Realizing* Padilla's *Promise: Ensuring Noncitizen Defendants Are Advised of the Immigration Consequences of a Criminal Conviction*, 39 FORDHAM URB. L.J. 169, 193–96 (2011) (discussing the difficulties inherent in informing defendants about collateral consequences); Derek Wikstrom, *"No Logical Stopping Point": The Consequences of* Padilla v. Kentucky*'s Inevitable Expansion*, 106 NW. U. L. REV. 351, 361–633 (2012) (discussing the expansion of *Padilla* to other collateral consequences).

bargains crafted to avoid immigration consequences.[117] In a notable recent exception, Heidi Altman examined the central role played by prosecutors in plea bargaining over immigration outcomes.[118] Altman argues that immigration-neutral plea bargains further values that prosecutors should care about, like proportional justice, conviction finality, and community safety.[119]

Darryl Brown, who has also written about the *Padilla* decision, takes a contrasting view of prosecutors' flexibility.[120] He argues that, at least with respect to high-volume drug trafficking cases like that of Jose Padilla, who was caught driving a truck containing 1000 pounds of marijuana, "no amount of creative negotiation between well-informed attorneys is likely to yield a disposition that avoids triggering automatic deportation."[121] Neither Altman nor Brown focus their attention on the dynamics of plea bargaining for immigration-safe outcomes in misdemeanor court, as I endeavor to do in Part III.[122] But before turning to that I will briefly outline what it means to "creatively" plea bargain to reduce the likelihood of deportation.

B. *Creative Plea Bargains*

The range of charge, fact, and sentence bargaining options available under criminal law allows prosecutors and defense counsel wide room to structure pleas. Voluminous criminal dockets and limited resources necessitate that most prosecutions be resolved through

---

117 *Padilla*, 130 S. Ct. at 1486 ("[T]he 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.").

118 Heidi Altman, *Prosecuting Post*-Padilla: *State Interests and the Pursuit of Justice for Non-Citizen Defendants*, 101 GEO. L.J. 1 (2012).

119 *Id.*; *see also* Robert M.A. Johnson, *A Prosecutor's Expanded Responsibilities Under* Padilla, 31 ST. LOUIS PUB. L. REV. 129, 130 (2011) (arguing that *Padilla* will directly and indirectly influence prosecutors' consideration of collateral consequences, presenting an opportunity to both do "justice and improve public safety").

120 Brown, *supra* note 113, at 1400–02.

121 *Id.* at 1402. Professor Brown may have underestimated the strength of Mr. Padilla's bargaining position. After the Supreme Court's remand in his case, the Kentucky Court of Appeals vacated his conviction, noting that among other possible defenses, Mr. Padilla could have argued that as an independent driver he didn't have permission to inspect the truck containers. In other words, Mr. Padilla met the prejudice prong for establishing ineffective assistance of counsel. *See* Padilla v. Kentucky, 381 S.W.3d 322, 330 (Ky. Ct. App. 2012). Moreover, a plea to felony solicitation under Kentucky state law on retrial might allow Padilla to avoid deportation. *See* Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 YALE L.J. (forthcoming 2013) (manuscript at 3–4) (on file with author) (discussing Padilla's options in the trial court having won his ineffective assistance claim).

122 Alice Clapman has discussed one particularly problematic aspect of petty prosecutions—the frequent lack of appointed counsel. She argues that *Padilla* requires the appointment of counsel in petty prosecutions where immigration consequences might follow. *See* Clapman, *supra* note 20.

pleas,[123] and few rules constrain prosecutors' discretion at the plea-bargaining stage.[124] Prosecutors have much to gain, professionally and personally, from negotiating pleas. Trials are significantly more labor intensive, and their outcomes less certain.[125] "[E]very plea bargain counts as a win but trials risk being losses."[126] The state, and the public too, may prefer the certainty of punishment that comes with plea bargains.[127] In short, prosecutors have incentives to resolve cases through pleas, and they are afforded wide latitude to do so.

The expansiveness of criminal codes affords prosecutors substantial flexibility in charging and bargaining. Prosecutors can substitute charges that do not require specific intent, mitigating the immigration consequences of a conviction.[128] They can reduce substantive charges, for example allowing defendants to plead to disorderly conduct instead of marijuana possession, or simple possession instead of purchase.[129] Prosecutors can consolidate separate counts, or agree to lesser sentences.[130] Even a one-day shorter sentence can mean the difference between deportation or not (for example, a sentence of 364 days instead of one year in cases involving crimes of violence or theft avoids the aggravated felony category).[131]

---

123 *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY SENTENCES IN STATE COURTS, 2006—STATISTICAL TABLES 25 tbl.4.1 (2009), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf (showing that ninety-four percent of felony offenders sentenced in state courts pleaded guilty).

124 *See* Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1025 (2006) ("Despite the significance of prosecutorial power, prosecutors operate with little oversight or regulation."); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2475–76 (2004) (explaining that unlike trials, plea bargaining is not publicly transparent and does not have clear rules governing prosecutors); Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1705–11 (2010) [hereinafter Bowers, *Legal Guilt*].

125 Bibas, *supra* note 124, at 2470–71; Stephen J. Schulhofer, *Criminal Justice Discretion as a Regulatory System*, 17 J. LEGAL STUD. 43, 50–51(1988).

126 Bibas, *supra* note 124, at 2471; *see also id.* at 2472 ("Losses at trial hurt prosecutors' public images, so prosecutors have incentives to take to trial only extremely strong cases and to bargain away weak ones.").

127 *Id.* at 2472.

128 Crimes of violence only involve moral turpitude if the defendant had a specific intent to do harm. KRAMER, *supra* note 51, at 210. Sexual conduct with a minor, for example, is not a crime of moral turpitude if the defendant could have been convicted under the statute without a finding that he knew or should have known the victim was a minor. *See In re* Silva-Trevino, 24 I. & N. Dec. 687, 708 (Op. Att'y Gen. 2008).

129 Even where simple possession of marijuana might trigger deportation (for lawfully present noncitizens, a first offense under thirty grams will not), the defendant may still be eligible for a waiver. But a marijuana purchase offense may be considered transactional, and therefore, a trafficking aggravated felony. *See* KRAMER, *supra* note 51, at 461–62.

130 Various categories of removability may be triggered where there are multiple counts, such as crimes involving moral turpitude or controlled substance offenses involving marijuana possession. *See generally id.* at 302, 312–13.

131 *See* 8 U.S.C. § 1101(a)(43)(F) (2012) (including a crime of violence, as defined by 18 U.S.C. § 16, within the category of aggravated felony if the term of imprisonment imposed is at

Parties can also affect the potential immigration consequences of convictions through plea agreements that only trigger deportation under certain factual scenarios, such as the amount of loss to the victim in a fraud case.[132] Criminal law tolerates fact-bargaining in plea negotiations and effective defense attorneys commonly negotiate changes to the quantity of drugs charged, or to other critical factual circumstances of the offense.[133] Even within rigid sentencing regimes, prosecutors and defendants can, and sometimes do, agree to misrepresent or conceal key facts that would lead to harsher sentences.[134]

One might object that consideration of immigration consequences in plea bargaining raises fairness concerns. But most pleas can be structured to avoid deportation without undermining the state's criminal justice interests in deterrence and uniform retribution. What the defendant gains by pleading to an alternate (or lesser) charge generally can be made up by additional penal sanctions. For example, increased community service or fines can offset the reduced jail time to avoid the aggravated felony category. In other situations, allowing the noncitizen to plead to immigration neutral charges in exchange for an equal or longer sentence might be an equitable resolution.

Despite the options theoretically available in plea bargaining, noncitizens face significant structural barriers to effective negotiation when charged with misdemeanors. As the following Part shows, the

---

least one year); *id.* § 1101(a)(43)(G) (including a theft crime within the category of aggravated felony if the term of imprisonment imposed is at least one year); United States v. Shaw, No. CRIM.A. 99-525-01, Civ.A. 03-6759, 2004 WL 1858336, at *9–11 (E.D. Pa. Aug. 11, 2004) ("[I]nstead of imposing concurrent 18 month sentences on all three counts . . . the Court could have imposed concurrent 9 month sentences on Counts Eight and Nine and a 9 month consecutive sentence on Count One. If the sentence were structured this way it would not have triggered the mandatory removal proceedings . . . because defendant's sentence on each count individually would not equal or exceed one year.").

132 *See* Nijhawan v. Holder, 557 U.S. 29, 42–43 (2009) (holding that immigration judges may rely on sentencing-related material to determine whether a fraud conviction involved losses greater than $10,000 and, therefore, would be considered an aggravated felony).

133 *See* Bibas, *supra* note 124, at 2484 (noting that the parties can agree to allow the defendant to plead to "using a telephone in the course of drug trafficking in lieu of a substantive drug-trafficking charge"); Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1170–71 (2008) [hereinafter Bowers, *Punishing the Innocent*] (discussing criminal law's toleration for legal fictions in plea bargaining, such as allowing defendants to "plead guilty to daytime burglaries to satisfy lesser charges, even when the crimes indisputably occurred in dark of night"); Ilene H. Nagel & Stephen J. Schulhofer, *A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines*, 66 S. CAL. L. REV. 501, 522, 547 (1992) (describing fact-bargaining cases); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2557 (2004) (describing "fact bargaining" about the quantity of drugs that the defendant would plead to possessing).

134 *See* STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE 44 (2012) ("Prosecutors and defense counsel agree to conceal or not disclose aggravating facts to sentencing judges."); *id.* at 191 n.34 (discussing a survey in which federal probation officers reported that "plea agreements frequently omit or misrepresent relevant facts").

Padilla Court's assumption that the parties will bargain for deportation-avoiding dispositions is least likely to occur precisely where the rift between the gravity of the criminal offense and the ensuing deportation consequence is largest.

III. THE PLEA-BARGAIN OBSTACLES FOR NONCITIZENS CHARGED WITH LOW-LEVEL OFFENSES

Padilla recognized that if noncitizens charged with crimes are to avoid disproportionate outcomes in the current immigration scheme, it falls to the institutional actors in state criminal proceedings to bargain around those consequences *ex ante*. The proportionality principle underlying the Court's reasoning is especially salient when applied to longtime residents charged with minor offenses that carry outsized deportation consequences. But proportionality concerns also arise for undocumented or otherwise deportable noncitizens, because minor convictions may disqualify them from a path to lawful status that would otherwise be available, or from any chance of lawful return to the United States in the future.

For both lawfully present and already deportable immigrants, the misdemeanor system is ill-designed to contend with individual equities or to evaluate outcomes beyond the immediate penal sanctions. Paradoxically, noncitizens arrested for low-level offenses that the state hardly punishes may face more significant structural impediments to effective plea bargaining for immigration-neutral outcomes than those accused of more serious crimes.

In the misdemeanor world, the procedural and adversarial processes that serve to legitimize felony convictions are largely absent. The dominant systemic norm driving the lower criminal courts is efficiency, and, as J.D. King surmises, "there is a vast distance between that value and whichever one comes in second."[135] Alexandra Natapoff offers this sobering description: "Massive, underfunded, informal, and careless, the misdemeanor system propels defendants through in bulk with scant attention to individualized cases and often without counsel."[136] The many process costs of misdemeanor adjudication—bail,

---

135 King, *supra* note 19, at 23; *see also* ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 33–44, 165–66 (2007) (discussing more generally how the realities of prosecutorial power and the prevalence of plea bargaining have diminished criminal law's constitutional procedural protections); Natapoff, *supra* note 19, at 1315–16; ("Far from accidental, the slipshod quality of petty offense processing is a dominant systemic norm that competes vigorously with and sometimes overwhelms foundational values of due process and adversarial adjudication.").

136 Natapoff, *supra* note 19, at 1315; *see also* FEELEY, *supra* note 19, at 10 ("Arrestees were arraigned in groups and informed of their rights *en masse*. At times the arrestees were not even aware that they are [sic] being addressed.").

pretrial detention, lost wages, multiple court appearances—make litigating cases to trial difficult, and, for many defendants, outweigh the possible penal sanctions.[137]

The misdemeanor system works poorly for all defendants, but noncitizens may fare worst of all. First, the institutional features of the system make it unlikely that noncitizens will be adequately informed about whether pleas affect their ability to remain in the United States.[138] In spite of *Padilla*'s mandate, noncitizens commonly plead guilty to petty offenses without knowing that deportation (and mandatory detention, or, at the least, a prohibitively high immigration bond) will result. Even where defendants learn that a plea may result in immigration consequences, time pressures and other endemic obstacles frustrate the ability to bargain for immigration-safe dispositions or mount a defense. Moreover, the ICE enforcement programs tend to magnify other process costs, further distorting the misdemeanor system's ability to sort meritorious prosecutions or reliably adjudicate guilt. Noncitizens placed under immigration detainers at booking, or who fear ICE contact in pretrial detention, have a tremendous incentive to plead guilty as quickly as possible in misdemeanor court, even to charges that trigger the possibility of additional immigration consequences, and even if they are innocent or have been subject to unlawful police practices.

A. *Little or No Information About Immigration Consequences*

An estimated ten million misdemeanor prosecutions are filed in this country every year—four or five times larger than the number of felonies.[139] In New York, for example, about seventy-five percent of prosecutions in 2010 and 2011 were for misdemeanors and violations.[140] Latinos and other people of color are increasingly among those arrested and prosecuted for low-level offenses in state court,[141] a trend

---

137 FEELEY, *supra* note 19, at 15; Bowers, *Punishing the Innocent*, *supra* note 133, at 1132–37; Natapoff, *supra* note 19, at 1343–47, 1351.

138 This is true for all misdemeanor defendants whose convictions might lead to collateral consequences, such as the loss of housing or other assistance. *See generally* Roberts, *supra* note 19.

139 King, *supra* note 19, at 23 (approximately eighty-five to ninety percent of the nine to eleven million criminal cases filed each year in state court are misdemeanors); Natapoff, *supra* note 19, at 1314–15, 1320–21 (citing 2008 data from the National Center for State Courts and 2009 data from the National Association of Criminal Defense Lawyers to estimate ten million misdemeanor prosecutions per year, four or five times larger than felony prosecutions).

140 In 2011, New York prosecuted 394,185 misdemeanors and 153,890 felonies. In 2010, 394,053 misdemeanors and 1154,007 felonies were prosecuted. *See 2007–2011 Disposition of Adult Arrests, New York State*, N.Y. STATE DIV. OF CRIMINAL JUSTICE SERVS., http://criminaljustice.state.ny.us/crimnet/ojsa/dispos/index.htm (last visited Feb. 25, 2013).

141 *See* ACLU OF N. CAL., COSTS AND CONSEQUENCES: THE HIGH PRICE OF POLICING

sometimes exacerbated in locations where local law enforcement interacts or shares overlapping duties with federal immigration officers through enforcement programs like section 287(g) and CAP.[142]

The misdemeanor system copes with this enormous volume through rapid processing made possible by the fact that nearly every defendant will plead guilty rather than exercise trial rights.[143] A study by Human Rights Watch in 2010, for example, found that 99.6% of misdemeanor convictions in New York City are guilty pleas.[144]

IMMIGRANT COMMUNITIES 16 (2011), *available at* https://www.aclunc.org/docs/criminal_justice/police_practices/costs_and_consequences.pdf (summarizing Ryan Gabrielson's 2010 report stating that in a number of California counties, police more frequently set up sobriety checkpoints to screen traffic in or near Hispanic neighborhoods); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 97–109 (2010) (arguing that although Latinos and people of color are not actually more likely to be guilty of drug crimes and other offenses than whites, there are huge racial disparities in who gets stopped, searched, and arrested); N.Y. CIVIL LIBERTIES UNION, STOP-AND-FRISK 2011: NYCLU BRIEFING 2 (2012), *available at* http://www.nyclu.org/files/publications/NYCLU_2011_Stop-and-Frisk_Report.pdf (finding that in 2011, blacks and Latinos accounted for more than fifty percent of police stops in almost every precinct in New York City, and that in thirty-three out of seventy-six precincts, ninety percent of stops were people of color); Amanda Geller & Jeffrey Fagan, *Pot as Pretext: Marijuana, Race and the New Disorder in New York City Street Policing*, 7 J. EMPIRICAL LEGAL STUD. 591, 593 (2010) ("Street stops are conducted predominantly in poor neighborhoods with high concentrations of black and Hispanic residents, at levels that exceed even what local disorder and crime conditions would predict, and marijuana arrests are clustered in many of the same neighborhoods . . . ." (citations omitted)); Natapoff, *supra* note 19, at 1324–39.

142 *See, e.g.*, EDGAR AGUILASOCHO ET AL., UNIV. OF CAL., IRVINE SCH. OF LAW, MISPLACED PRIORITIES: THE FAILURE OF SECURE COMMUNITIES IN LOS ANGELES COUNTY 16–18 (2012), *available at* http://www.law.uci.edu/pdf/MisplacedPriorities_aguilasocho-rodwin-ashar.pdf (noting increased racial profiling in policing following the implementation of the Secure Communities program); TREVOR GARDNER II & AARTI KOHLI, CHIEF JUSTICE EARL WARREN INST. ON RACE, ETHNICITY & DIVERSITY, THE C.A.P. EFFECT: RACIAL PROFILING IN THE ICE CRIMINAL ALIEN PROGRAM 1 (2009), *available at* http://www.law.berkeley.edu/files/policybrief_irving_FINAL.pdf ("[I]mmediately after Irving, Texas law enforcement had 24-hour access . . . to ICE in the local jail, discretionary arrests of Hispanics for petty offenses—particularly minor traffic offenses—rose dramatically."); Billy Ball, *DOJ Ends Federal Immigration Program in Alamance County*, INDY WEEK (Sept. 26, 2012), http://www.indyweek.com/indyweek/doj-ends-federal-immigration-program-in-alamance-county/Content?oid=3157331 (reporting that following a Department of Justice (DOJ) report accusing Alamance County, North Carolina deputies and Sheriff Terry Johnson of biased policing, ICE terminated the section 287(g) program in the county); Kari Lydersen, *Racial Profiling, Republican Candidates, and Rights Violations: The Immigration Debate at Year's End*, ALTERNET (Jan. 1, 2012), http://www.alternet.org/story/153626/racial_profiling,_republican_candidates,_and_rights_violations%3A_the_immigration_debate_at_year%27s_end (reporting that Arizona's section 287(g) program was revoked following a DOJ investigation finding that Maricopa County Sheriff Arpaio engaged in pervasive racial profiling); Albor Ruiz, *President Obama, Please Don't Expand Failed Immigration Program 287(g)*, N.Y. DAILY NEWS (July 18, 2009), http://www.nydailynews.com/new-york/president-obama-don-expand-failed-immigration-program-287-g-article-1.400519 (describing the section 287(g) program as "synonymous with racial profiling").

143 FEELEY, *supra* note 19, at 28 ("Despite their differences of position, prosecutors, defense attorneys, and judges are said to have a common administrative interest in the rapid processing of cases which plea bargaining facilitates.").

144 HUMAN RIGHTS WATCH, supra note 4, at 3.

Defendants throughout the country are afforded mere minutes, or even seconds, in front of misdemeanor judges, a feat sometimes accomplished through advising defendants of their rights and taking guilty pleas en masse.[145]

Not only do courts afford misdemeanor defendants little time, but huge numbers also journey through the process without the assistance of an attorney[146]—a problem for all defendants and one that can mean banishment for noncitizens. Although in *Argersinger v. Hamlin* the Supreme Court extended an indigent defendant's right to counsel to misdemeanor prosecutions,[147] states are not constitutionally required to appoint counsel where there is no possibility of incarceration.[148] Unsurprisingly, many states and municipalities do not provide indigent defense counsel in these circumstances.[149] Even where a criminal statute provides for prison as a potential sanction, courts often forgo appointing counsel if incarceration will not result in the particular defendant's case.[150] The Board of Immigration Appeals (BIA) recently held that the fact that states do not provide indigent defendants counsel for minor offenses does not preclude use of those convictions for immigration purposes.[151]

Where incarceration might be imposed, misdemeanor defendants nevertheless frequently plead guilty without the assistance of counsel. A

---

145 FEELEY, *supra* note 19, at 11; Natapoff, *supra* note 19, at 1328–29.

146 *See, e.g.*, BORUCHOWITZ ET AL., *supra* note 6, at 14–17 (citing empirical research indicating a significant percentage of unrepresented defendants in state misdemeanor court); FEELEY, *supra* note 19, at 9 (noting that approximately fifty percent of 1640 defendants observed in a Connecticut lower court over a period of several months proceeded without the assistance of counsel); Natapoff, *supra* note 19, at 1328–29.

147 407 U.S. 25 (1972); *see also* Alabama v. Shelton, 535 U.S. 654, 667 (2002) (holding that courts cannot impose incarceration on the basis of a misdemeanor probation violation unless the defendant had counsel in the underlying adjudication).

148 Scott v. Illinois, 440 U.S. 367, 373–74 (1979). As Alice Clapman observes, at the time that *Scott v. Illinois* was decided, "it was extremely rare for a noncitizen to be deported based on a single non-jailable conviction." Clapman, *supra* note 20, at 590.

149 *See, e.g.*, CONN. GEN STAT. § 51-296(a) (2012); MASS. GEN. LAWS ch. 211D, § 2B (2012); S.C. CODE ANN. § 17-3-10 (2012); S.D. CODIFIED LAWS § 23A-40-6.1 (2012); VT. STAT. ANN. tit. 13, § 5201(4)–(5), 5231 (2012); VA. CODE ANN. § 19.2-160 (2012); WYO. STAT. ANN. §§ 7-6-102(a)(v), -104(a) (2012); ARK. R. CRIM. P. 8.2(b); FLA. R. CRIM. P. 3.11(b)(1); ME. R. CRIM. P. 44(a)(1); N.D. R. CRIM. P. 44(a)(2); OHIO R. CRIM. P. 44(B).

150 *See, e.g.*, ARK. R. CRIM. P. 8.2(b) (counsel need not be provided where "the indigent is charged with a misdemeanor and the court has determined that under no circumstances will incarceration be imposed as a part of the punishment if the indigent is found guilty"); *Rules Governing the Courts of the State of New Jersey—Second Appendix to Part VII: Guidelines for Determination of Consequence of Magnitude*, N.J. COURTS, http://www.judiciary.state.nj.us/rules/r7-2nd_appendix.htm (last updated Feb. 1, 2013) (stating that the judge is to consider, inter alia, whether a sentence of imprisonment will be imposed before assigning counsel to an indigent defendant).

151 *See In re* Cuellar-Gomez, 25 I. & N. Dec. 850, 851–54 (B.I.A. 2012) (holding that a municipal marijuana violation where the defendant was not afforded a right to counsel or advised of potential immigration consequences counts as a conviction for immigration purposes).

number of reports have shown that courts across the country fail to appoint an attorney for petty defendants even when legally required to do so.[152] Often the judge, or the court clerk, fails to inform defendants of their right to counsel.[153] Alternatively, defendants are told they must negotiate directly with prosecutors, following which the defendants almost invariably waive counsel and plead guilty.[154] Colorado goes so far as to statutorily mandate that misdemeanor defendants speak directly with prosecutors in order to come to a plea agreement.[155] As a result, advocates report that only a small handful of misdemeanor defendants in that state, many of whom are noncitizens, ever speak with an attorney.[156]

In forty states, numerous counties do not provide defendants with an attorney at bail hearings,[157] in violation of *Rothgerry v. Gillespie County*.[158] Bail hearings are often the most critical phase of petty prosecutions, because most defendants who can't make bail plead guilty. In some jurisdictions, poor defendants languish in pretrial incarceration

---

152 *See, e.g.*, AM. BAR ASS'N, GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE 22–26 (2004), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf; BORUCHOWITZ ET AL., *supra* note 6, at 15.

153 AM. BAR ASS'N, *supra* note 152, at 24–25; BORUCHOWITZ ET AL., *supra* note 6, at 15–16.

154 AM. BAR ASS'N, *supra* note 152, at 24–25 (discussing reports of prosecutors frequently negotiating directly with defendants in Georgia and Texas); BORUCHOWITZ ET AL., *supra* note 6, at 16–17 (discussing reports of prosecutors negotiating directly with defendants in Tennessee, Texas, Pennsylvania, Washington, and Colorado); FEELEY, *supra* note 19, at 220 (describing the process in Connecticut misdemeanor court in which prosecutors ask unrepresented defendants, "Do you want to get your own attorney, apply for a public defender, or get your case over today?"); NAT'L LEGAL AID & DEFENDER ASS'N, A RACE TO THE BOTTOM: SPEED & SAVINGS OVER DUE PROCESS: A CONSTITUTIONAL CRISIS 15 (2008), *available at* http://www.michigancampaignforjustice.org/docs/Michigan%20NLADA%20report.pdf (reporting that in Michigan misdemeanor courts, defendants "are arraigned, pretrial conferences are held, and, if a plea can be worked with the [defendants], sentences imposed generally all in a single day without defense counsel present").

155 COLO. REV. STAT. § 16-7-301(4) (2013).

156 BORUCHOWITZ ET AL., *supra* note 6, at 17 ("In practice, most misdemeanor defendants in Colorado never see a public defender."); Telephone Interview with Violeta Chapin, Assoc. Clinical Professor of Law, Univ. of Colo. Law Sch. (July 26, 2012) (on file with author) [hereinafter Chapin Interview] (explaining that there is virtually no representation for misdemeanor defendants in Colorado besides the sixteen to twenty clients per year accepted by her criminal/immigration defense clinic at the University of Colorado Law School and those cases taken by a similar clinic at the University of Denver).

157 As of 2009, in ten states (Alabama, Kansas, Maryland, Michigan, Mississippi, New Hampshire, Oklahoma, South Carolina, Tennessee, and Texas) no indigent defendants are provided counsel at bail hearings. *See* Douglas L. Colbert, *Prosecution Without Representation*, 59 BUFF. L. REV. 333, 396 (2011). In thirty more states, "a defendant's chance for a lawyer's advocacy at the initial bail hearing depends on the county where the arrest occurred." *Id.* at 400–10.

158 554 U.S. 191, 213 (2008) ("[A] criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.").

for months before seeing a prosecutor or judge, let alone defense counsel.[159]

Judges also coerce defendants to waive counsel in petty cases.[160] Judges tell defendants that if they plead guilty they will go home right away, but if they want a defense attorney they'll remain jailed for (at least) a few more days, increasing pressure to plea.[161] This kind of coercion is particularly effective with juvenile defendants.[162] Even where judges issue general, pro forma advisals that criminal convictions may carry immigration consequences, or offer defendants the option of continuing the case to speak with an attorney, those who are subject to pretrial detention rarely choose to delay if they can plead right away to a disposition with a lenient criminal sanction.[163] Not yet knowing the actual immigration consequences of seemingly minor charges, and offered the opportunity to conclude the criminal case, misdemeanor defendants plead in haste.

Of course, even when appointed, misdemeanor defenders may not be able to competently advise noncitizens of immigration consequences. As discussed in more detail below, the majority of public defenders who represent misdemeanor defendants are overburdened, inexperienced, and subjected to significant pressure from prosecutors and judges to encourage rapid pleas.[164] Overburdened attorneys simply do not have time to learn much about their clients' personal circumstances and

---

159 AM. BAR ASS'N, *supra* note 152, at 22–26 (discussing common failures to provide counsel in Mississippi, Georgia, Montana, Washington, California, and elsewhere).

160 *See* BORUCHOWITZ ET AL., *supra* note 6, at 15–17; FEELEY, *supra* note 19, at 220.

161 AM. BAR ASS'N, *supra* note 152, at 25; *see also* BORUCHOWITZ ET AL., *supra* note 6, at 15–16 (reporting that judges often fail to caution misdemeanor defendants about proceeding without counsel and merely ask "whether the defendant want[s] to dispose of the case quickly").

162 AM. BAR ASS'N, *supra* note 152, at 25 (citing numerous reports suggesting that judges habitually tell juveniles to waive their right to counsel in delinquency proceedings). Although adjudications of delinquency are not "convictions" for immigration purposes, courts have approved their use to deny applicants for adjustment of status and other immigration relief on discretionary grounds. *See, e.g.*, Wallace v. Gonzales, 463 F.3d 135, 139 (2d Cir. 2006). *See generally* Elizabeth M. Frankel, *Detention and Deportation with Inadequate Due Process: The Devastating Consequences of Juvenile Involvement with Law Enforcement for Immigrant Youth*, 3 DUKE F. FOR L. & SOC. CHANGE 63, 85–93 (2011)

163 Chapin Interview, *supra* note 156 (observing this dynamic in Colorado misdemeanor courts). For detailed recommendations on best practices for judges presiding over criminal cases involving unrepresented defendants, see NIKKI REISCH & SARA ROSELL, IMMIGRANT DEF. PROJECT & N.Y UNIV. SCH. OF LAW IMMIGRANT RIGHTS CLINIC, JUDICIAL OBLIGATIONS AFTER *PADILLA V. KENTUCKY*: THE ROLE OF JUDGES IN UPHOLDING DEFENDANTS' RIGHTS TO ADVICE ABOUT THE IMMIGRATION CONSEQUENCES OF CRIMINAL CONVICTIONS (2011), *available at* http://immigrantdefenseproject.org/wp-content/uploads/2011/11/postpadillaFINALNov2011.pdf.

164 BORUCHOWITZ ET AL., *supra* note 6, at 14, 33, 39; Bibas, *supra* note 124, at 2481 (arguing that new defenders lack experience, skill, knowledge, and credibility with prosecutors and judges).

immigration situations.[165] Many mistakenly believe that most petty offenses do not carry immigration consequences. Others may know slightly better, but still will not recognize important distinctions between types of convictions for purposes of triggering deportation or qualifying for discretionary relief from removal. They may assume, for example, that if a defendant already has a petty conviction for trespassing, reckless driving, or simple marijuana possession, another misdemeanor won't make a difference. But a DUI with a suspended license, a narcotics misdemeanor, or an additional simple marijuana possession offense can put the defendant in a much worse immigration situation.[166]

B. *Little Hope of Negotiating Immigration-Safe Pleas*

1. Prosecutors and Categorical Charging

Noncitizens may well be charged and prosecuted for low-level offenses irrespective of the merits of their arrests.[167] While undoubtedly there is jurisdictional variation, prosecutors are more likely to reflexively file charges in low-stakes cases, even on weak evidence.[168] In petty cases, the police's arrest paperwork tends to be skeletal and conclusory, giving prosecutors little means to readily sort out the cases that are less meritorious.[169] As Josh Bowers puts it, "[p]rosecutors can proceed with almost everything, because all cases look good enough; and they cannot determine what to cast aside, because no case looks all that bad."[170]

---

165 *See infra* Part III.B.2.

166 Each of these could be a deportable offense. *See, e.g.*, Marmolejo-Campos v. Holder, 558 F.3d 903 (9th Cir. 2009) (upholding BIA's determination that respondent's conviction for DUI with a suspended license was a CIMT). Even if the noncitizen is already deportable because of prior criminal history or immigration violations, the specifics of the additional conviction can affect eligibility for discretionary relief. *See infra* Part III.B.2 (discussing how variations between similar convictions can make a critical difference in immigration outcomes).

167 In general, declination rates for felonies tend to be much higher than for misdemeanors. *See* Bowers, *Legal Guilt*, *supra* note 124.

168 *See, e.g.*, Bowers, *Legal Guilt*, *supra* note 124, at 1700–03; Bowers, *Punishing the Innocent*, *supra* note 133, at 1126–27; *cf.* Kohler-Hausmann, *supra* note 5, at 63 fig. 9 (citing data that NYC district attorneys declined to prosecute about twelve percent of misdemeanor arrests in 2011).

169 Bowers, *Legal Guilt*, *supra* note 124, at 1701–02; Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 RUTGERS L. REV. 1317, 1362 ("As long as the [police] report contains elements of a prima facie case . . . this report . . . typically will be sufficient to meet the pretrial screening requirements imposed to justify the detention and charging of the defendant."); Natapoff, *supra* note 19, at 1328 ("Prosecutors fail to screen and instead charge arrestees based solely on allegations in police reports.").

170 Bowers, *Legal Guilt, supra* note 124, at 1702; *see also* Weinstein, *supra* note 2, at 1159

When it comes to petty cases, prosecutors also have an interest in expediently securing as many convictions as possible, even if the punishment imposed is mild.[171] Unlike with felony charges, prosecutors routinely offer misdemeanor defendants generic, cookie-cutter dispositions that do not carry serious penalties under state law, with the expectation of quick pleas.[172] Although prosecutors' policies towards misdemeanor dispositions fluctuate across and even within jurisdictions over time,[173] it is evident that in the misdemeanor world actual culpability is often presumed or irrelevant.[174]

For the noncitizen defendant, however, nearly automatic plea-deals that seem mild can result in deportation. To illustrate, consider the not uncommon case in which police stop a driver for speeding and discover what appears to be paraphernalia for smoking marijuana. Prosecutors in these cases routinely charge both reckless driving and possession of drug paraphernalia (PDP), and then offer a plea to the PDP charge with probation or time-served.[175] For many defendants this may be a beneficial bargain, because that charge won't result in drivers license points and they can return immediately to their lives. But for noncitizens, the PDP offense qualifies as a deportable controlled substance offense.[176] If the noncitizen doesn't have counsel—and often even if she does—she will neither learn that PDP carries immigration consequences nor try to negotiate a better bargain.[177] If ICE has marked the noncitizen with an immigration detainer, she may also be unaware that the PDP plea will increase the amount of bond required to secure release from inevitable immigration custody.[178] In fact, immigration

(arguing that it is "very difficult for our lower criminal courts to reliably sort minor cases according to their merits").

171 Bowers, *Punishing the Innocent*, *supra* note 133, at 1139–45; *see also id.* at 1135 n.77 ("As an institutional matter, low-set bargain prices are the most efficient means to ensure that unimportant cases plead quickly en masse, with minimal defendant hesitation.").

172 Bowers, *Legal Guilt, supra* note 124, at 1702–05.

173 *See, e.g.*, Kohler-Hausmann, *supra* note 5 (demonstrating that though arrests for low-level offenses in NYC have exploded in recent years, misdemeanor prosecutions and convictions have not increased proportionally).

174 *See, e.g.*, Bowers, *Legal Guilt, supra* note 124, at 1707 ("Guilt is typically presumed in a process too rough-and-ready for the parties to develop and consider it properly . . . ."); Natapoff, *supra* note 19, at 1328–30, 1369–70.

175 Chapin Interview, *supra* note 156.

176 *See* Luu-Le v. INS, 224 F.3d 911, 914 (9th Cir. 2000) (holding that a conviction for possession of drug paraphernalia under Arizona law is an offense "relating to a controlled substance" under 8 U.S.C. § 1227(a)(2)(B)(i) (2000)).

177 Chapin Interview, *supra* note 156 (reporting that one Colorado prosecutor admitted that he had "been offering PDP pleas to unrepresented misdemeanor defendants subject to ICE holds for a long time").

178 *See generally* AMNESTY INT'L, JAILED WITHOUT JUSTICE: IMMIGRATION DETENTION IN THE USA 17–19 (2009), *available at* http://www.amnestyusa.org/pdfs/JailedWithoutJustice.pdf (reporting that ICE field officers and immigration judges set higher bonds for noncitizens with criminal histories).

judges can order detention without bond based solely on pending criminal charges,[179] and all controlled substance offenses render respondents bond ineligible.[180]

For many additional reasons, negotiation with prosecutors can be difficult in minor cases. Prosecutors frequently work misdemeanor dockets by shift and appear on cases about which they have little knowledge or discretion.[181] Or, if they were the one to write up the case, they most likely proceeded on the word of one police officer whose information they had neither the incentive nor the time to question. New prosecutors, cutting their teeth on misdemeanor cases, may need permission from supervisors to deviate significantly from the original charge.[182] They are also the "most deferential to supervisory authority and are therefore least likely to buck policy by exercising case-specific equitable discretion."[183] New prosecutors may also be systematically harsher.[184]

On the other hand, veteran misdemeanor prosecutors, though perhaps mellowed with time, may be dulled by the repetition of their work.[185] For them, a new defendant is just "the usual man in the usual place."[186] Prosecutors' caseloads are substantial and their days are full.[187] If they can avoid further work, especially in the petty cases about which they care the least, they will.[188] Part-time prosecutors—comprising

---

179 *See, e.g.*, *In re* Guerra, 24 I. & N. Dec. 37, 40–41 (B.I.A. 2006) (upholding an immigration judge's decision to deny bond based on drug charges despite the fact that respondent had not yet been convicted).

180 8 U.S.C. § 1226(c)(1)(A) (2012).

181 Weinstein, *supra* note 2, at 1181 ("In the lower-level court in which I practice, the prosecutors very rarely appear on their own cases. They read from a note in the file, have no personal knowledge about the case in front of them and precious little discretion.").

182 DAVIS, *supra* note 135, at 34 (assistant prosecutors who wish to deviate from office charging policy may need to seek permission from a supervisor).

183 Bowers, *Legal Guilt*, *supra* note 124, at 1704 (citing MILTON HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES AND DEFENSE ATTORNEYS 92–99 (1981)); *see also* 1 JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE: INVESTIGATION 4 (4th ed. 2006) ("Prosecutors' offices . . . often have internal guidelines governing such matters as charging decisions and plea bargains."); Todd Lochner, *Strategic Behavior and Prosecutorial Agenda Setting in United States Attorneys' Offices: The Role of U.S. Attorneys and Their Assistants*, 23 JUST. SYS. J. 271 (2002) (arguing that the prosecutorial priorities of newer federal prosecutors are more aligned with office policy while veterans are more willing to create their own prosecutorial agenda).

184 Bibas, *supra* note 124, at 2475.

185 FEELEY, *supra* note 19, at 4 ("Prosecutors, dulled by their repetitive work, may be noncommunicative and appear to be vindictive.").

186 Bowers, *Legal Guilt, supra* note 124, at 1689.

187 *See* Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U. L. REV. 261, 270 (2011) ("[P]rosecutors in many large counties handle far more cases than guidelines recommend."); Weinstein, *supra* note 2, at 1181 ("[P]rosecutors have to spend a good deal of their time in court and have just a few hours at the start and end of the day to talk with witnesses, draft papers, and carry out their other responsibilities.").

188 HEUMANN, *supra* note 183, at 156–57; Bibas, *supra* note 124, at 2471 ("Prosecutors have

roughly a quarter of the Nation's prosecutors[189]—may be even less likely than their full-time counterparts to engage in protracted negotiations or consider individual case dispositions outside the norm.[190]

In sum, though particular district attorney's offices and prosecutors might be sympathetic to the outsized immigration consequences of a minor offense in some cases,[191] the institutionalities that often govern misdemeanor prosecutions present significant challenges for noncitizen defendants seeking individualized equitable consideration of immigration consequences. Categorical charging and fixed priced plea deals are efficient ways of doing business, and prosecutors have little reason to invest in the extra effort that would be required to give misdemeanor cases particularized evaluation.

Given these factors, it comes as little surprise that immigrant advocates report difficulties in persuading misdemeanor prosecutors to take a close look at the equities of individual noncitizens' cases, even in jurisdictions with significant institutional awareness of the immigration issues affecting defendants. Heidi Altman, who was previously in-house immigration counsel at the Neighborhood Defender Service of Harlem, describes the "extraordinary efforts" sometimes required to convince prosecutors to consider alternative pleas in minor cases.[192] Her account of one LPR client's experience is telling. In a case that would seem to present strong equities—a gainfully employed family man with longtime lawful immigration status and no prior criminal history, arrested for

---

personal incentives to reduce their workloads so that they can leave work early enough to dine with their families"); Bowers, *Punishing the Innocent*, *supra* note 133, at 1140–41 ("[P]rosecutors also harbor the normatively more dubious motivation to avoid process and work, where possible.").

189 *See* Roger A. Fairfax, Jr., *Delegation of the Criminal Prosecution Function to Private Actors*, 43 U.C. DAVIS L. REV. 411, 419 (2009).

190 FEELEY, *supra* note 19, at 75 (part-timers have a "strong incentive to rush through the calendar in order to return to their full-time jobs"); James Eisenstein, *Research on Rural Criminal Justice: A Summary*, *in* CRIMINAL JUSTICE IN RURAL AMERICA 105, 125 (Shanler D. Cronk et al. eds., 1982) (explaining the "incentives for part-time prosecutors . . . to avoid time-consuming proceedings"); Fairfax, *supra* note 189, at 442 (arguing that part-time prosecutors "give short shrift to the criminal cases").

191 *See, e.g.*, Altman, *supra* note 118; Chin, *supra* note 17, at 1435 ("Accordingly, based on negotiations with defense counsel, prosecutors regularly consider lesser charges, diversion, or non-prosecution to allow relatively less serious offenders to avoid deportation, such as when prosecutors granted a misdemeanor plea granted to the noncitizen mother of the famous 'Balloon Boy.'" (footnote omitted)); Johnson, *supra* note 119. Altman's survey of prosecutors in the Kings County District Attorney's Office under Charles Hynes (likely one of the more progressive offices in the country), revealed that just over fifty percent of the 185 prosecutors who responded believe pleas should sometimes be altered to mitigate negative immigration consequences, though "less than half actually translate this belief into practice with any frequency." Altman, *supra* note 118, at 29. Just across the East River, the office of Manhattan District Attorney Cyrus R. Vance, Jr. may be somewhat less sympathetic. *See* Cyrus R. Vance, Jr., *Collateral Consequences: Who Really Pays the Price for Criminal "Justice"?*, 54 HOW. L.J. 539, 541 (2011).

192 Altman, *supra* note 118, at 3–7.

smoking one marijuana cigarette while walking the dog—Altman relates a process involving multiple, vigorous entreaties to the prosecutor and her supervisor, supported by a flood of letters from family, friends and employers, that ultimately secured an alternative plea to a disorderly conduct violation.[193] The Bronx Defenders, an office renowned for its holistic approach to criminal defense—with a cadre of in-house immigration attorneys to advise defense counsel—likewise reports plea-bargaining successes achieved for sympathetic noncitizen defendants after significant advocacy and negotiations.[194] Anecdotal accounts suggest that the immigration consequences of convictions are even less salient influences on plea bargaining in other jurisdictions.[195]

2. Public Defenders' Incentives to Plea Bargain Quickly

In the vast majority of petty prosecutions where counsel is appointed, public defenders[196] meet their clients for the first time at

---

193 *Id.* at 3.

194 McGregor Smyth, formerly the managing attorney in the Civil Action Practice at the Bronx Defenders, for example, relates that it took "[e]arly intervention and extensive negotiation" to convince a prosecutor to allow an LPR arrested for visiting his children at the family home (in violation of a family court order of protection for his wife) to plead to trespassing violations. McGregor Smyth, *"Collateral" No More: The Practical Imperative for Holistic Defense in a Post-*Padilla *World . . . or, How to Achieve Consistently Better Results for Clients*, 31 ST. LOUIS U. PUB. L. REV. 139, 151 (2011); *see also* Brooks Holland, *Holistic Advocacy: An Important but Limited Institutional Role*, 30 N.Y.U. REV. L. & SOC. CHANGE 637, 651 (2006) ("In my experience [as a public defender in New York City], therefore, uncommon is the case where a prosecutor or judge materially mitigates a disposition solely because of a perceived collateral consequence, especially in more serious cases."); Smyth, *supra*, at 151–52 (convincing a prosecutor to offer a misdemeanor plea with no jail time where a man accidentally fired a gun into his neighbor's home required "significant advocacy"). In a telephone interview, Jennifer Friedman, an immigration attorney at the Bronx Defenders, confirmed that negotiations for immigration-safe pleas can require substantial effort. *See* Telephone Interview with Jennifer Friedman, Bronx Defenders Immigration Counsel, Bronx, N.Y. (Aug. 3, 2012) (on file with author) [hereinafter Friedman Interview].

195 *See, e.g.*, Altman, *supra* note 118, at 34 (noting that many prosecutors are unwilling to modify the plea offers routinely extended to citizen defendants in cases where the defendant is a noncitizen (citing Telephone Interview by Heidi Altman with Ann Benson, Immigration Project Supervising Att'y, Wash. Defender Ass'n (Jan. 9, 2012); Telephone Interview by Heidi Altman with Raha Jorjani, Supervising Att'y and Lecturer, Univ. of Cal. Davis Sch. of Law Immigration Law Clinic (Jan. 2, 2012); and Telephone Interview by Heidi Altman with Manuel Vargas, Senior Counsel, Immigrant Def. Project (Aug. 16, 2011))); Brown, *supra* note 113, at 1407 ("In sum, prospects are probably intermittent at best that state prosecutors will be actively inclined toward crafting bargains that would reduce the odds of deportation, even in cases where plausible plea bargain options exist for such a disposition."); *see also supra* text accompanying notes 175–177 (discussing an example of prosecutorial indifference to categorical plea offers in minor cases that can result in immigration consequences for noncitizen defendants).

196 Unless otherwise specified, my use of "public defender" includes county or statewide public defender offices, organizations with contracts to provide indigent defense, and panel attorneys assigned to indigent defendants.

arraignments, confer briefly about the prosecutor's offer, and then resolve the case with a plea.[197] Throughout the country, underresourced public defender offices tackle overwhelming caseloads. Although national criminal justice standards recommend that defenders handle no more than 400 misdemeanor cases per year, actual representation numbers throughout the country far exceed that cap. Defenders in Chicago, Atlanta, Miami, Dallas, Arizona, Tennessee, and Utah carry misdemeanor caseloads numbering in the thousands.[198] Part-time defenders in New Orleans may represent as many as 19,000 misdemeanor arrestees per year, limiting them to a mere seven minutes per case.[199]

If overburdened defenders in petty cases already lack the time to adequately investigate and litigate defenses,[200] they will also find it difficult to make the additional effort to carefully assess alternate immigration-safe pleas or to discover and marshal client equities sufficient to convince the prosecutor to deviate from her usual categorical approach to plea negotiation. Determining whether a particular plea offer will foreclose discretionary relief from removal, for example, requires knowledge of both subtle variations in immigration law and familiarity with the defendant's individual circumstances.[201]

---

197 *See, e.g.*, AM. BAR ASS'N, *supra* note 152, at 16 ("Witnesses recounted numerous examples of representation so minimal that it amounted to no more than a hurried conversation with the accused moments before entry of a guilty plea and sentencing."); JUSTICE POLICY INST., SYSTEM OVERLOAD: THE COSTS OF UNDER-RESOURCING PUBLIC DEFENSE 13 (2011), *available at* http://www.justicepolicy.org/uploads/justicepolicy/documents/system_overload_final.pdf ("In many jurisdictions across the country defenders meet with their clients minutes before their court appearance in courthouse hallways, often just presenting an offer for a plea bargain from the prosecution without ever conducting an investigation into the facts of the case or the individual circumstances of the client."); Steven Zeidman, *Policing the Police: The Role of the Courts and the Prosecution*, 32 FORDHAM URB. L.J. 315, 331 (2005) ("The high volume of pleas at [misdemeanor] arraignments is especially alarming given that the defense lawyer has just met the client and has not yet investigated and researched the facts and law of the case." (footnote omitted)).

198 BORUCHOWITZ ET AL., *supra* note 6, at 21.

199 *Id.*

200 *See id.* at 30–31 ("[A]cross the country[,] defenders do not have enough time to see their clients or to prepare their cases adequately, there are no witness interviews or investigations, they cannot do the legal research required or prepare appropriate motions, and their ability to take cases to trial is compromised."); Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1081–82 (2006) (explaining that an attorney with a large misdemeanor caseload "simply does not have the time or the resources to investigate, prepare, or communicate adequately with the client so that the client can make an informed decision and the attorney can advocate zealously for his client's best interests"); Bibas, *supra* note 124, at 2479 ("In addition, overburdened defense attorneys cannot spend enough time to dig up all possible defenses.").

201 While *Padilla*'s rule applies on its face only to deportation consequences of convictions, proportionality concerns are also raised when convictions foreclose paths to discretionary relief or lawful return to the United States that would otherwise have been available. *See infra* text accompanying notes 293–296. *See generally* Michael J. Wishnie, *Immigration Law and the Proportionality Requirement*, 2 U.C. IRVINE L. REV. 415, 431–35 (2012) (arguing that bars to

The noncitizen's current immigration status, years of residence in the United States, and family circumstances will all be highly relevant factors.[202] For example, noncitizens who overstay a visa and have one conviction for simple possession of marijuana might qualify for a waiver of inadmissibility if they can show extreme hardship to a qualifying family member, but two such offenses will bar such relief.[203] A single misdemeanor conviction for sale of marijuana may eliminate all discretionary relief for LPRs, whereas multiple counts of misdemeanor possession might not.[204] Nor are the myriad distinctions among which convictions will foreclose discretionary relief intuitive.[205] In fact, even just determining whether a defendant is a U.S. citizen is not always clear-cut.[206] And because of budgetary constraints, most public defender offices simply do not have the resources to hire in-house immigration attorneys to assist defenders in making these determinations.

Compounding the problem of excessive caseloads, misdemeanor defenders typically have little experience. Petty prosecutions are viewed as disposable cases that provide training to new hires (often just out of law school).[207] New defenders are less skilled negotiators and have yet to develop credibility with prosecutors and judges.[208] Defenders quickly learn that good relationships with prosecutors may lead to better deals for their clients.[209] While some clients will benefit from successfully

---

lawful reentry based on convictions or immigration violations also raise proportionality concerns).

202 Clapman, *supra* note 20, at 610.

203 *See* 8 U.S.C. § 1182(h) (2012) (amended in parts not relevant to the analysis here by the Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat 54 (2013)).

204 Cancellation of removal is available to otherwise eligible LPRs with multiple marijuana possession offenses so long as the convictions do not fall under the recidivist aggravated felony category. *See* Carachuri-Rosendo v. Holder, 130 S. Ct. 2577 (2010); KRAMER, *supra* note 51, at 221–35, 373. Additionally, certain petty convictions will foul up the possibility of naturalization for LPRs. *See generally* Kevin Lapp, *Reforming the Good Moral Character Requirement for U.S. Citizenship*, 87 IND. L.J. 1571 (2012).

205 A firearms or domestic-violence offense, for example, won't stop the clock for purposes of accruing the seven-year residence requirement for LPR cancellation of removal, but a controlled substance offense will. *See* 8 U.S.C. § 1229b(d)(1)(B) ("For purposes of this section, any period of continuous residence . . . shall be deemed to end . . . when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States . . . ."); KRAMER, *supra* note 51, at 370–71. As another example, pleas to offenses involving pharmaceuticals may be safe, while offenses involving narcotics will not be. *Id.* at 460.

206 *See generally* Jacqueline Stevens, *U.S. Government Unlawfully Detaining and Deporting U.S. Citizens as Aliens*, 18 VA. J. SOC. POL'Y & L. 606 (2011) (discussing difficulties in determining citizenship and the prevalence of detaining and deporting U.S. citizens).

207 BORUCHOWITZ ET AL., *supra* note 6, at 39 ("Many public defenders start in misdemeanor courts after being hired right out of law school."); Bowers, *Legal Guilt*, *supra* note 124, at 1709 ("In my former practice, public order cases went by the evocative title 'disposables,' because that is what institutional actors intended for them."); Stevens, *supra* note 206, at 2481, 2486 (explaining that new defenders may lack the experience to be good negotiators).

208 Bibas, *supra* note 124, at 2481, 2486.

209 *Id.* at 2475.

forged relationships, this dynamic may also lead defense attorneys "to represent their clients less vigorously."[210] Judges, clerks, and prosecutors pressure public defenders to be pliable in plea bargaining—those who rock the boat too much may face future reprisals.[211]

Another impediment to zealous misdemeanor representation is that defenders are paid fixed salaries to represent large numbers of indigent clients.[212] The problem is generally the same with appointed counsel, who are paid fixed fees or low rates subject to caps.[213] An Illinois state statute, for example, provides that assigned counsel are to be paid only $150 per misdemeanor case.[214] Often there are little or no additional funds for investigation or for hiring experts.[215] As Professor Bibas observes, lawyers in high volume practices paid a small, fixed salary, or a low per-case rate, have incentives to plead cases out as quickly as possible.[216]

Language and cultural barriers may also influence public defenders' choices (and results) in the plea-bargain process. More than half of the foreign-born population is limited English proficient,[217] and the supply of qualified interpreters lags far behind the demand.[218] The Legal Services Corporation has recognized lawyering across language differences as the most significant challenge faced by poverty lawyers today.[219] Language and cultural differences complicate investigation of defenses or mitigating circumstances, preparation of testimony or equitable factors, and client counseling at all stages of representation. In

---

210 Albert W. Alschuler, *Personal Failure, Institutional Failure, and the Sixth Amendment*, 14 N.Y.U. REV. L. & SOC. CHANGE 149, 151 (1986).

211 Bibas, *supra* note 124, at 2480.

212 *Id.* at 2476. Compensation for misdemeanor defenders is woefully inadequate—around $40,000 per year in some places. *See* AM. BAR ASS'N, *supra* note 152, at 9–10; BORUCHOWITZ ET AL., *supra* note 6, at 42–43.

213 Bibas, *supra* note 124, at 2476.

214 AM. BAR ASS'N, *supra* note 152, at 9 (reporting an attorney's testimony at public hearings conducted by the American Bar Association).

215 BORUCHOWITZ ET AL., *supra* note 6, at 38.

216 Bibas, *supra* note 124, at 2477.

217 Muneer I. Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 54 UCLA L. REV. 999 (2007) (discussing the massive increase of limited English proficient immigrants among the clients served by poverty lawyers); Peter L. Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, a Case Study*, 78 FORDHAM L. REV. 541, 551 (2009) ("Fifty-two percent of the foreign-born population are limited English proficient.").

218 Ahmad, *supra* note 217, at 1008; *see also id.* at 1031–61 (discussing the difficulties of lawyering on behalf of limited English proficient clients both with and without interpreters).

219 LEGAL SERVS. CORP., GUIDANCE TO LSC PROGRAMS FOR SERVING CLIENT ELIGIBLE INDIVIDUALS WITH LIMITED ENGLISH PROFICIENCY 1 (2004), *available at* http://lri.lsc.gov/sites/default/files/LRI/pdf/04/Program_Letter_LEP_Guidance.pdf ("Among the many vast changes that affect how and what services LSC programs provide to clients, none is more significant than the high number of immigrants that have come to the United States over the past few decades.").

short, an attorney who cannot communicate effectively with her client will not be able to competently perform core lawyering tasks.[220]

Additionally, defenders may believe (and it is sometimes true) that their immigrant clients will be prejudiced by their inability to "speak the language of the court."[221] Cultural and language differences may also reduce a defender's patience or empathy for her client.[222] Challenges like these decrease defense counsel's ability to establish enough trust to have an honest conversation with a client about his or her immigration status.[223]

In sum, rarely do misdemeanor defenders have the ability or incentive to engage in the kind of zealous, outside-the-box lawyering needed to overcome the entrenched norms governing misdemeanor prosecutions in many jurisdictions. Ultimately, these challenges increase the likelihood that defense counsel will encourage a quick plea, rather than litigate the case to trial or engage in the investigation and effort required to negotiate a plea that takes the client's individual equities and immigration situation into account.[224]

---

220 Ahmad, *supra* note 217, at 1022.

221 *See generally* Ahmad, *supra* note 217, at 1001 ("Cases like these, in the health care system, the criminal justice system, and the courts, have begun to draw public attention to the ways in which inadequate attention to the country's growing language diversity increasingly jeopardizes life and liberty interests, particularly of poor people."); Jason A. Cade, *Narrative Preferences and Administrative Due Process*, 14 HARV. LATINO L. REV. 155, 162–65, 169–85, 189 (2011) (discussing how biases based on cultural and professional differences in narrative style can influence adjudicators' assessments of credibility and treatment of parties).

222 *See, e.g.*, Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 GOLDEN GATE U. L. REV. 345, 377 (1997) (examining how unconscious racism and cultural hegemony can affect the relationship between a lawyer and a client); Kathlyn Mackovjak, *Interviewing Immigrant Clients*, *in* CULTURAL ISSUES IN CRIMINAL DEFENSE, 39, 41–48 (Linda Friedman Ramirez ed., 3d ed. 2010) (discussing how language and cultural barriers complicate criminal representation of immigrant clients).

223 *See* Steven Zeidman, Padilla v. Kentucky*: Sound and Fury, or Transformative Impact*, 39 FORDHAM URB. L.J. 203, 223 (2011) ("As every text and article ever written about criminal defense interviewing and counseling has observed, it generally takes time, thought, and patience to develop a relationship of mutual trust and respect before a client is willing to tell counsel of 'negative' or incriminating facts (for example, that he is here illegally).").

224 Ahmad, *supra* note 217, at 1000–30 (discussing the lack of professional and ethical standards guiding the representation of limited English proficient immigrants); Susan Bryant, *The Five Habits: Building Cross-Cultural Competence in Lawyers*, 8 CLINICAL L. REV. 33, 47–48 (2001) (discussing how cultural differences can lead to wide disparities when evaluating the merits of a particular plea bargain).

3. Process Costs and Leverage

a. Bail and Immigration Status

Misdemeanor defendants who cannot make bail usually plead guilty.[225] When bail is imposed as a condition of release, most defendants charged with minor offenses do not have the funds to post it.[226] Immigrants in particular tend to be low-wage earners.[227] In New York City, for example, defendants overwhelmingly cannot make bail even where the bond is set at $1000 or less.[228] Nevertheless, judges often set the amount much higher than $1000.[229] Nationwide, about eighty-five percent of defendants (both felony and misdemeanor) cannot afford bail.[230]

Pretrial detention imposes substantial hardships on individuals and their families. Overcrowded, violent, and unhealthy, pretrial jails often boast conditions worse than prison (and in fact, a good forty percent of jail inmates have already been convicted).[231] In addition to the punitive

225 *See, e.g.*, BORUCHOWITZ ET AL., *supra* note 6, at 30–33 (reporting anecdotes from around the country about bail and other pressures on misdemeanor defendants to plead guilty at the earliest opportunity); ALISA SMITH & SEAN MADDAN, NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, THREE-MINUTE JUSTICE: HASTE AND WASTE IN FLORIDA'S MISDEMEANOR COURTS 15 (2011), *available at* https://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=20794&libID=20764 (concluding, based on a study of misdemeanor prosecutions in twenty-one Florida counties, that the inability to make bail may be the "most significant predictor of defendants entering a plea of guilty or no contest at arraignment.").

226 NAT'L ASS'N OF PRETRIAL SERVS. AGENCIES, THE TRUTH ABOUT COMMERCIAL BAIL BONDING IN AMERICA 8 (2009), *available at* http://www.napsa.org/publications/napsafandp1.pdf (noting that nationwide, about eighty-five percent of all defendants cannot afford bail); Bibas, *supra* note 124, at 2491–93.

227 *See* Ahmad, *supra* note 217, at 1011–12 (describing studies showing "correlations between limited English proficiency of recent immigrants and poverty"); Markowitz, *supra* note 217, at 551 (citing the U.S. Census for the proposition that the foreign-born "are disproportionately poor and . . . significantly more likely to be lacking in basic education"); Michael S. Vastine, *Give Me Your Tired, Your Poor . . . and Your Convicted? Teaching "Justice" to Law Students by Defending Criminal Immigrants in Removal Proceedings*, 10 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 341, 349 (2010) ("[A] look at the wealth disparity of most first generation immigrants relative to the general population reveals a population more socio-economically vulnerable to both heavy policing and poor legal representation.").

228 HUMAN RIGHTS WATCH, *supra* note 4, at 1; *see also* Bowers, *Punishing the Innocent*, *supra* note 133, at 1136 ("[I]n New York City in 2004, only ten percent of defendants held on bail were able to buy release at arraignment . . . ."); Natapoff, *supra* note 19, at 1324 ("[Eighty] percent of those arrested [in New York City for misdemeanor marijuana possession] are black or Latino. For those required to post bail, the vast majority cannot pay . . . ." (footnote omitted)).

229 HUMAN RIGHTS WATCH, *supra* note 4, at 12–13 (reporting that in fifty-eight percent of non-felony cases where bail was required as a condition of release in 2008, judges set the bail amount at $1000 or more).

230 NAT'L ASSOC. OF PRETRIAL SERVS. AGENCIES, *supra* note 226.

231 Natapoff, *supra* note 19, at 1322–1323 (describing widespread violence and disease in jails).

conditions of jail, the inability to work while incarcerated cuts deep.[232] For poor families, even short-term cessation of income may result in severe consequences, such as the loss of a home, apartment, or car, and lasting health and emotional problems in children.[233]

How often is a bail bond required in petty cases? Although the traditional bail factors—flight risk and public safety—are virtually the same everywhere, the prevalence of bail bonds appears to depend in part on where the defendant is charged. New York City judges impose bail as a condition of release in about twenty-five percent of non-felony cases that survive arraignment.[234] In Baltimore, about fifty percent of non-felony defendants must post bail to be released while awaiting further proceedings in their case.[235] In Feeley's study of a Connecticut lower court, bail was required of forty-eight percent of arrestees.[236]

Additionally, many jurisdictions now take a defendant's immigration status into account when setting (or denying) bail.[237] In some states, immigration status is one factor to be considered in evaluating a defendant's flight risk.[238] Judges in these jurisdictions typically consider alienage along with family and community ties, property ownership, and similar factors.[239] Other states have legislated presumptions that undocumented residents should be denied bail.[240] In Missouri, for example, a defendant believed to lack lawful status can be held until he can prove otherwise.[241] Alabama's anti-immigrant legislation pushed this trend even further, requiring courts setting bail to make "a reasonable effort" to determine the noncitizen's immigration

232 FEELEY, *supra* note 19, at 30 (explaining that the costs of lost wages and jobs outweigh the cost of conviction for most misdemeanor defendants).

233 *See, e.g.*, HUMAN RIGHTS WATCH, *supra* note 4, at 2, 23; JUSTICE POLICY INST., *supra* note 197, at 18.

234 *See* Secret, *supra* note 3, at A27.

235 *See, e.g.*, Douglas Colbert, Ray Paternoster & Shawn Bushway, *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1732–33 (2002).

236 FEELEY, *supra* note 19, at 206.

237 *See* Chin, *supra* note 17, at 1423–26.

238 *Id.* at 1424 (citing to case law in California, Florida, Georgia, Kentucky, New Jersey, New York, Ohio, and Texas). Federal courts also have considered alienage as a factor in setting bail. *See, e.g.*, United States v. Salas-Urenas, 430 F. App'x 721, 723 (10th Cir. 2011); United States v. Miguel-Pascual, 608 F. Supp. 2d 83, 86 (D.D.C. 2009); United States v. Chavez-Rivas, 536 F. Supp. 2d 962, 968–69 (E.D. Wis. 2008).

239 *See, e.g.*, S.C. CODE ANN. § 17-15-30(B)(4) (2012) (requiring the court to consider whether the defendant's legal status indicates flight risk). As of February 28, 2013, no cases have cited this provision.

240 *See, e.g.*, VA. CODE ANN. § 19.2-120.1(A) (2012) (creating a presumption that no condition, or combination of conditions, will reasonably assure appearance of a defendant who has been identified as illegally in the United States by ICE and charged with one of several crimes, including misdemeanor DWI); *see also* Chin, *supra* note 17, at 1423–24 (citing state statutes in Missouri, Virginia, South Carolina, and Illinois).

241 MO. REV. STAT. § 544.470(2) (2012). As of February 28, 2013, no cases have cited this statute.

status.[242] If determined to be unlawfully present, the defendant is categorically considered a flight risk, denied bail, and detained until the prosecution is complete.[243] Although a federal judge granted a preliminarily injunction halting portions of the Alabama law from going into effect, most of which was upheld on appeal by the 11th Circuit, this provision was not enjoined.[244] It is very difficult for noncitizens placed under immigration detainers to obtain bail because detainers are often considered evidence of flight risk.[245] In practice, detainers often increase incarceration by weeks or even months.[246]

If ineligible for release or unable to post the required bond, defendants are jailed while awaiting further proceedings. More than half of all detained defendants spend at least a month incarcerated while the cases against them slowly proceed, and, for more than twenty-five percent, pretrial incarceration lasts between two and six months.[247] Taking a case to trial (or winning a dismissal on speedy trial grounds) will likely take six months or more in some jurisdictions, even for

---

242 H.B. 56 § 19(a), 2011 Leg., Reg. Sess., 2011 Ala. Laws 535 (codified at ALA. CODE § 31-13-18 (2012)) ("[W]hen a person is charged with a crime for which bail is required, . . . a reasonable effort shall be made to determine if the person is an alien unlawfully present in the United States . . . .").

243 *Id.*

244 *See* United States v. Alabama, 813 F. Supp. 2d 1282, 1293 (N.D. Ala. 2011) (granting preliminary injunctions against certain provisions of H.B. 56, but not section 19), *aff'd in part rev'd in part*, 691 F.3d 1269 (11th Cir. 2012); Complaint for Declaratory and Injunctive Relief at 340, *United States v. Alabama*, 813 F. Supp. 2d 1282 (No. 5:11CV02484), 2011 WL 2654277; *see also United States v. Alabama*, 691 F.3d 1269 (upholding most of the District Court's preliminary injunction but not considering section 19).

245 *See* AGUILASOCHO ET AL., *supra* note 142, at 3 ("[P]olice often refuse to accept bail from people who have ICE detainers . . . ."); ANDREA GUTTIN, IMMIGRATION POLICY CTR., THE CRIMINAL ALIEN PROGRAM: IMMIGRATION ENFORCEMENT IN TRAVIS COUNTY, TEXAS 12 (2010), *available at* http://www.immigrationpolicy.org/sites/default/files/docs/Criminal_Alien_Program_021710.pdf ("ICE-detainer inmates are unlikely to receive bail while awaiting trial."); AARTI SHAHANI, JUSTICE STRATEGIES, NEW YORK CITY ENFORCEMENT OF IMMIGRATION DETAINERS: PRELIMINARY FINDINGS 4 (2010), *available at* http://www.immigrantjustice.org/sites/immigrantjustice.org/files/NYC%20Detainer%20Report.pdf ("While New York has no such *de jure* prohibition on bail for non-citizens, the immigration detainer acts as a *de facto* one.").

246 *See* SHAHANI, *supra* note 245, at 1 ("Controlling for race and offense level, noncitizens with an ICE detainer spend 73 days longer in jail before being discharged, on average, than those without an ICE detainer."); Felisa Cardona, *ACLU Sues Jeffco Sheriff over Lengthy ICE Hold*, DENVER POST (Apr. 22, 2010), http://www.denverpost.com/news/ci_14932928. The additional jail time stems from a number of factors, including ICE delays in following up, difficulties obtaining bail from police or courts once placed under a hold, and the detainer's impediments to accessing alternative-to-incarceration programs. *See* AGUILASOCHO ET AL., *supra* note 142, at 3; GUTTIN, *supra* note 245, at 12–13; KOHLI ET AL., *supra* note 73, at 7.

247 Natapoff, *supra* note 19, at 1321 (citing DORIS J. JAMES, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: PROFILE OF JAIL INMATES, 2002 (2004), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/pji02.pdf); *see also* Chapin Interview, *supra* note 156 ("Fighting a case all the way to trial in Boulder means sitting in jail for at least two to three months.").

detained defendants.[248] As a result, the length of pretrial detention often exceeds any punishment that the state might impose after conviction.[249]

For most defendants, noncitizens included, the costs associated with remaining incarcerated while fighting petty charges appear to outweigh the cost of pleading guilty at the earliest opportunity.[250] The prospect of both prohibitively high bail and lack of information generally looms larger for noncitizens than other defendants. Moreover, while it is true that those noncitizens who are accurately informed of the immigration consequences may assess the process costs differently, the ICE enforcement programs in jails provide a countervailing force, powerfully inciting noncitizens to plea quickly, as I explain further in Part III.C.

b. Little Likelihood of Success

The defendant's custody determination, among other factors, also affects her ability to prevail at trial, which in turn influences plea-bargaining leverage. Incarcerated defendants are more likely to be convicted than those who remain free pending disposition.[251] Detained defendants will have difficulty meeting with their attorneys and tracking down witnesses or other evidence for a defense.[252] They will also have trouble marshaling letters of support, medical records, and other equities sufficient to convince prosecutors that an alternative immigration-safe plea is warranted.[253] If the noncitizen has retained private counsel, his or her inability to work may impede payment of legal fees—a problem that is exacerbated where cases drag on longer than expected.

---

248 Friedman Interview, *supra* note 194 (explaining that misdemeanor defendants in the Bronx often must remain in jail for at least six months if they do not want to plead guilty).

249 *See, e.g.*, FEELEY, *supra* note 19, at 10 (presenting the results of an empirical study finding that twice as many defendants in minor cases were incarcerated before trial as after conviction).

250 BORUCHOWITZ ET AL., *supra* note 6, at 32–33 (relating anecdotal accounts from attorneys from New York, Phoenix, and Philadelphia about the pressure jailed defendants feel to plead guilty); FEELEY, *supra* note 19.

251 Mark Noferi, *Cascading Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings*, 18 MICH. J. RACE & L. 63, 106 (2012) ("Thus, it is increasingly accepted that pretrial criminal detention—even with appointed counsel—leads to more wrongful convictions."); Ric Simmons, *Private Criminal Justice*, 42 WAKE FOREST L. REV. 911, 984–85 (2007) ("One study found that defendants who are incarcerated prior to trial are 35% more likely to be convicted than those who are not—if the defendant is facing a felony charge, he is 70% more likely to be convicted if he is in jail before trial . . . ." (citing Joseph L. Lester, *Presumed Innocent, Feared Dangerous: The Eighth Amendment's Right to Bail*, 32 N. KY. L. REV. 1, 50 (2005))).

252 Bibas, *supra* note 124, at 2493; Lester, *supra* note 251, at 51 (arguing that a free defendant can assist in finding witnesses and has fuller access to his or her attorney).

253 *See generally* Bibas, *supra* note 124, at 2491–93.

Even when defendants are at liberty pre-trial, many obstacles prevent them from winning their cases outright. As noted, defendants may lack counsel or may be appointed public defenders who are inexperienced or overwhelmed. Lack of competent counsel can be meaningful, as misdemeanor defenses often require careful assessment of legally relevant facts[254] or complicated constitutional issues.[255] Attorneys whose clients plead in every (or nearly every) case lack trial experience, which also reduces their plea-bargaining leverage. High volume misdemeanor representation makes pleas the norm, and when a lawyer always plea bargains, trial is not a credible threat.[256] Prosecutors, on the other hand, have well-documented conviction biases, decreasing the likelihood that the case will be resolved short of trial unless the defendant pleads to something.[257]

Fighting charges usually involves lengthy delays and multiple court appearances.[258] Even after suppression hearings and other pretrial matters are concluded—a milestone that in busy jurisdictions can take many months to reach—defendants often must continue to appear on multiple occasions before finally receiving a bench trial.[259] Although defendants may sometimes be able to win dismissals under speedy trial rules, the many exceptions to the statutory limit mean that the rules do not significantly constrain prosecutorial delay.[260] Many defendants eventually succumb to fatigue or miss court appearances.

Finally, in the public order offenses that comprise the bread and butter of misdemeanor prosecutions, the "evidence" of guilt most often consists of the arresting officer's testimony, which may be privileged

---

254 BORUCHOWITZ ET AL., *supra* note 6, at 12 (observing that careful assessment of the legally important facts might make a difference in the outcome of a seemingly simple trespass case).

255 *See* Roberts, *supra* note 19, at 303 ("Like felonies, misdemeanor cases raise issues of suppression in drug and weapons cases, expert testimony in drug, assault, and drunk driving cases, and Crawford/Confrontation Clause issues in domestic violence and other types of cases." (footnotes omitted)). Public order offenses may raise free speech, overbreadth, vagueness, or other constitutional concerns. *Id.* at 304.

256 Bibas, *supra* note 124, at 2478–79.

257 *Id.* at 2471–72; Bowers, *Legal Guilt*, *supra* note 124, at 1703 & n.224. The acceptable range of dispositions in minor cases will obviously vary depending on the policies of the individual prosecutor or her office, and may sometimes include non-criminal infractions or adjournments in contemplation of dismissal, but the generalization that prosecutors tend to not dismiss cases once charges have been filed is at this point widely accepted.

258 FEELEY, *supra* note 19, at 10 ("Cases in which there was no trial, no witnesses, no formal motions, no pretrial involvement from the bench, and no presentence investigation still required as many as eight or ten different appearances spread over six months."); HEUMANN, *supra* note 183, at 70–71 (1978) (defendants who wish to fight their cases must come "[b]ack and back and back"); Weinstein, *supra* note 2, at 1172.

259 *Id.*

260 Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM. L. REV. 1123, 1140 (2005); Weinstein, *supra* note 2, at 1172 ("[W]ithout any delay by the defense, it is very rare for a case to get to trial before the fifth court date.").

over a contrary account by the defendant.[261] Moreover, judges (there is no right to a jury trial for "petty offenses")[262] may informally adjust the burden of proof in accordance with the severity of criminal punishments.[263] Studies have suggested that adjudicators convict on less evidence where defendants are charged with minor offenses or face less severe criminal sanctions.[264] There is evidence that policy-makers are aware that offenses with lesser sanctions make convictions easier to obtain. As Professors Guttel and Teichman have observed, legislators at times intentionally lower penalties, particularly with respect to drug-related offenses, "not to weaken the punitive attitude toward marijuana but rather to strengthen it by overcoming the hurdle of securing convictions in the face of harsher punishment."[265]

---

261 *See* Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. (forthcoming 2013) (manuscript at 29) (on file with author) ("A large percentage of misdemeanor cases (such as drug cases or public order offenses) rest solely on the word of law enforcement, making the likelihood of a cognitive bias in favor of the police in a 'client said, police said' kind of case particularly high, even by defense counsel.").

262 *See* Baldwin v. New York, 399 U.S. 66, 69 (1970); Duncan v. Louisiana, 391 U.S. 145, 160 (1968).

263 *See* Ehud Guttel & Doron Teichman, *Criminal Sanctions in the Defense of the Innocent*, 110 MICH. L. REV. 597, 601–07 (2012) (reviewing the results of a number of empirical and experimental studies as well as legislation and case law supporting the assertion that "the evidentiary threshold for conviction is correlated with the size of criminal punishments"). Such adjustment of the burden of proof is, of course, unconstitutional. *See, e.g.*, Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (affirming that all elements of an offense must be proven beyond a reasonable doubt).

264 Martha Myers, for example, studied data from a random sample of 201 jury trials and concluded that juries were more willing to convict where the crime was less serious. Martha A. Myers, *Rule Departures and Making Law: Juries and Their Verdicts*, 13 LAW & SOC'Y REV. 781, 785, 793–94 (1979); *see also* FUSAKO TSUCHIMOTO & LIBOR DUSEK, RESPONSES TO MORE SEVERE PUNISHMENT IN THE COURTROOM: EVIDENCE FROM TRUTH-IN-SENTENCING LAWS 3, 11, 18–19 (2011), *available at* http://www.coll.mpg.de/economix/2010/paper/dusek.pdf (presenting the results of a study indicating that tough "truth-in-sentencing" laws decrease the probability of a conviction by nine percent); James Anderoni, *Criminal Deterrence in the Reduced Form: A New Perspective on Ehrlich's Seminal Study*, 33 ECON. INQUIRY 476, 479–82 (1995) (demonstrating an inverse connection between level of punishment and conviction rates). As Professors Guttel and Teichman note, there may be other possible explanations for the results of these empirical studies. For example, defendants may spend more on their legal defense when the sanctions are more severe. *See* Guttel & Teichman, *supra* note 263, at 602. However, a number of controlled experimental studies also support the conclusion that judges and mock jurors adjust the burden of proof in accordance with the severity of the offense. *See generally id.* at 602–03 (describing a range of experimental studies). In one study, for example, mock jurors interpreted the "beyond a reasonable doubt" standard to require only seventy-five percent probability of guilt for petty larceny, in contrast to ninety-five percent for murder. Rita James Simon & Linda Mahan, *Quantifying Burdens of Proof: A View from the Bench, the Jury, and the Classroom*, 5 LAW & SOC'Y REV. 319, 328 (1971).

265 Guttel & Teichman, *supra* note 263, at 604 (quoting a state senator who promoted a bill lowering the penalty for marijuana possession in Nebraska as saying, "With the 7 day penalty for the possession of a nominal amount, the courts will rather promiscuously [sic] based on the evidence, apply these penalties." (alteration in original)); *see also id.* at 604–05 (citing to statements by Maine legislators indicating concern that a "tougher [sex offender] bill would make it harder to secure convictions, and would force prosecutors to make victims take the stand in order to present more evidence to the court").

In short, choosing to litigate a petty charge may not significantly increase plea-bargaining leverage. Whether legally innocent or not, acquittal is a dim prospect for most misdemeanor defendants, especially noncitizens.

C. *Plea Bargaining in the Shadow of Immigration Detainers*

Thus far in this Part, I have concentrated on features of the misdemeanor system that are more or less common in many jurisdictions throughout the country. Our close examination of how these norms play out for noncitizens reveals the tremendous obstacles they face in obtaining favorable outcomes for immigration purposes in lower criminal courts. Defendants who lack competent counsel, or any attorney at all, will not be aware of the immigration consequences of guilty pleas to petty charges. Even when defendants have knowledgeable counsel, effective plea bargains and acquittals are difficult to achieve. To be sure, where noncitizens are made aware that the total sanction includes deportation or other immigration consequences, the cost-benefit calculation changes, increasing the likelihood that they would try to fight their cases at trial whatever the odds of success.[266] But there is a countervailing dynamic in the thousands of jurisdictions where ICE has integrated immigration enforcement programs with local criminal processes. The ICE programs exacerbate the process costs for noncitizens and often quash what incentives they might otherwise have to fight the criminal case.

Though local implementation of the enforcement programs varies, in broad strokes there are essentially two scenarios that matter in misdemeanor cases. The sections that follow consider the defendants' plea-bargain incentives in each scenario. First, the enforcement programs influence misdemeanor cases where potentially deportable defendants are likely to encounter ICE further along in the criminal process. Those who cannot make bail often must choose between any plea that offers an end to detention (e.g., time-served, probation, community service, or a diversionary program), and detection by ICE if they delay to investigate or defend against the charges. In the second scenario, in which the defendant comes to arraignments already subject to an immigration detainer, paying the criminal bond and even prevailing in criminal court will seem futile without a clear path to legal

266 Robert A. Mikos, *Enforcing State Law in Congress's Shadow*, 90 CORNELL L. REV. 1411 (2005) (arguing that where defendants know they face immigration consequences as the result of a conviction they are more likely to take the case to trial); Weinstein, *supra* note 2, at 1177 ("[S]o long as the cost of the proceeding is greater than the ultimate sanction, most cases will never be litigated.").

status. For these defendants, already identified as deportable, fighting the criminal case just adds to the cost and length of proceedings that will eventually result in removal from the United States.

1. Defendants Not Yet Subject to Detainers

The bail determination is critical for noncitizens not yet under an immigration detainer but potentially subject to one. For noncitizens with lawful status who are charged with deportable offenses, as well as those who are already deportable because of civil immigration violations, failure to make bail may lead to removal proceedings, or at the least, prolonged state detention. As described above, many defendants who are eligible for bail for relatively minor offenses nevertheless do not have enough money to post the bond.[267] Oftentimes state legislatures or individual judges elevate bond amounts for noncitizens, or deny bail altogether.[268]

In jurisdictions where immigration enforcement programs give ICE agents access to jail, the specter of pretrial detention tends to pressure defendants who cannot post bail to take quick pleas to lenient criminal sanctions, even where they might be able to prevail at trial or negotiate an alternative deal by holding out. Though the conviction may raise the specter of additional immigration consequences, misdemeanor defendants gamble that avoiding ICE in jail may allow them to permanently escape detection by immigration authorities.[269] For many foreign-born defendants, then, avoiding exposure to ICE in jail eclipses all other concerns.[270]

The defendant's attorney, if appointed, often has only minutes at the bail hearing to evaluate the defendant's immigration situation, the chances of success in both criminal and immigration proceedings, and the likely amount of the immigration bond.[271] At this point in the

---

267 *See infra* Part III.B.3.

268 *See infra* Part III.B.3.

269 The federal government does not have the resources to apprehend even ten percent of the many millions of noncitizens living in this country who are deportable because of civil immigration violations or past convictions. *See* Motomura, *supra* note 109, 1829–33.

270 Telephone Interview with Jocelyn Simonson, Supervising Attorney, Bronx Defenders (Feb. 4, 2012) (on file with author) [hereinafter Simonson Interview] ("For many noncitizens, staying out of Rikers Island, [where ICE screens for deportable arrestees,] is the number one priority."); *see also infra* notes 277–283 and accompanying text (discussing criminal court cases from New York City that shed some light on the influence of the ICE programs on plea bargaining). A few jurisdictions, New York City included, have recently taken steps to minimize the influence of detainers in certain circumstances. *See infra* Part V.

271 THE SPANGENBERG GRP., *supra* note 1, at 143 ("[L]arge percentages of misdemeanor, violation and infraction cases plead out at arraignment, often times after a lawyer has met with his or her client for only a couple minutes. . . . During these few minutes, attorneys are expected to assess whether to recommend the defendant plead or not, consult with the defendant and

proceedings, counsel will have very little information about the strength of the prosecutor's case. Moreover, even experienced counsel will be challenged to accurately assess the potential immigration consequences in a single, brief meeting with a new client, let alone negotiate an alternative plea bargain with the prosecutor. Given the time pressure and risk, defendants offered an opportunity to walk out the courthouse door at arraignments are incentivized to make what appears to be the best of a bad situation and plead guilty, even to dispositions with negative immigration consequences and even if they are innocent.[272]

Because cognitive biases can play such a powerful role in evaluation of a plea, one can understand why noncitizens are willing to plea quickly to convictions that may have devastating future consequences, and that they might be able to avoid with effort and time, in exchange for certain (if tenuous) freedom now.[273] Most people are more willing to gamble future losses than immediate ones.[274] For deportable noncitizens, any outcome short of actual removal may be presented or perceived as a gain and therefore a good deal.

Although the incentives at work are clear, data documenting the frequency that noncitizens plead to avoid contact with ICE is admittedly difficult to come by. In general, attorneys are understandably cautious about revealing whether and how often they advise innocent clients to strategically plead guilty.[275] Nevertheless, a prominent practice manual guiding noncitizen representation in criminal proceedings recommends that "[w]here defendant is undocumented and does not yet have an ICE detainer," defense counsel should "employ whatever strategies are available if avoiding ICE apprehension is defendant's highest priority."[276]

A number of decisions evaluating ineffective assistance of counsel claims reveal that some noncitizens do take pleas motivated by avoiding ICE detection. In *People v. Cristache*, for example, a New York City

fully advise him or her of the consequences that come along with having a criminal conviction . . . ." (footnote omitted)).

272 Simonson Interview, *supra* note 270.

273 *See* Bibas, *supra* note 124, at 2513–15 (discussing how gain-framing affects plea-negotiations); Andrew E. Taslitz, *The Political Economy of Prosecutorial Indiscretion*, *in* CRIMINAL LAW CONVERSATIONS 533, 534 (Paul H. Robinson et al. eds., 2011) (arguing that most defendants undervalue future harms).

274 Bibas, *supra* note 124, at 2504, 2505 & n.172 (observing that defendants often discount future costs when plea bargaining, valuing "a day of freedom today . . . more than a day of freedom ten years from now").

275 For a thoughtful discussion of the debate among judges, advocates, and academics about the ethics of facilitating guilty pleas of innocent persons, see Bowers, *Punishing the Innocent*, *supra* note 133.

276 NAT'L IMMIGRATION PROJECT, UNDERSTANDING IMMIGRANT DETAINERS: AN OVERVIEW FOR STATE DEFENSE COUNSEL 21 (2011), *available at* http://www.nationalimmigrationproject.org/legalresources/practice_advisories/pa_Understanding_Immigration_Detainers_05-2011.pdf.

Criminal Court judge found that a lawful permanent resident had not received ineffective assistance where his counsel advised him to plead guilty rather than proceed to trial on removable offenses.[277] The court noted that the defendant's attorney negotiated a disposition that "conditionally guaranteed that defendant would have remained 'out of jail'—i.e., Rikers Island—where ICE agents routinely engage in a concerted effort to identify criminal aliens for deportation."[278] The court observed that "the risk of removal (or the risk of detection for removal) may be reduced where a noncitizen is able to remain out of jail, as the plea negotiated by plea counsel anticipated."[279] The court praised defense counsel's "holistic approach," concluding that the attorney's strategy "effectively placed defendant in the best position to avoid actual deportation."[280]

Similarly, in *People v. Bevans*, the court found that defense counsel reasonably negotiated a plea to Disorderly Conduct with release for time-served, in part because it minimized the possibility of detection by ICE.[281] The court noted, "ICE routinely monitors the Corrections Department in a concerted effort to identify criminal alien Defendants subject to deportation removal proceedings," and, consequently, the "risk of removal for a criminal defendant alien is reduced when such alien is able to secure a release from jail."[282] Other recent trial court decisions also cast light on the pressure that ICE access to pretrial detention places on plea bargains.[283]

It is worth noting that noncitizens' desperate strategies for avoiding ICE detection do not always work, however, even in the relative short term. Frequently, for example, defendants in minor cases must agree to

---

277 907 N.Y.S.2d 833, 847 (Crim. Ct. 2010).

278 *Id.* at 846.

279 *Id.* at 847.

280 *Id.* at 845–46.

281 926 N.Y.S.2d 345, No. 20704V-2008, 2011 WL 923077, at *14 (N.Y. Sup. Ct. Jan. 31, 2011).

282 *Id.* at *14; *see also id.* at *9 (noting that the district attorney's office's opposition to defendant's motion to reopen argued that the defendant was not prejudiced by a guilty plea that allowed him to avoid detection by ICE in pretrial detention).

283 *See, e.g.*, People v. Santana, No. 05420/1997, 2012 WL 2377788, at *9 n.14 (N.Y. Sup. Ct. June 19, 2012) ("Indeed, the fact that Defendant received a sentence of probation may have benefitted him in the immigration context in that incarcerated inmates may be more likely than non-incarcerated persons to be targeted by U.S. Immigrations and Enforcement Agency [sic] for deportation."); People v. Noriega, No. SCI 1776/92, 2012 WL 954270, at *2 (N.Y. Sup. Ct. Mar. 19, 2012) ("Incarceration increases a defendant's chances of being deported since ICE specifically targets incarcerated individuals. Rather than being prejudiced by his non-jail disposition in 1992, defendant, himself, actually lessened his chances of being deported by accepting the plea offer." (citation omitted)); People v. Quing Lin Zeng, No. 2010CN006198, 2011 WL 5041792, at *1–2 (N.Y. Crim. Ct. Oct. 21, 2011) (holding that the defendant, arrested for selling subway card swipes, had not been prejudiced by accepting defense attorney's advice to plea to a non-jail disposition because doing so avoided contact with ICE and "actually lessened his chances of being deported").

probation to avoid jail time. ICE has occasionally relied on local probation and parole officers to facilitate the arrest of noncitizens with criminal records.[284] It is unclear whether this risk of later detection has any effect on the plea incentives (and cognitive biases) for noncitizens charged with misdemeanors but not yet subject to detainers.

2. Defendants Already Subject to Detainers

Certain noncitizens arrested in a Secure Communities jurisdiction typically will already be tagged with immigration detainers by the time of their first court appearance. At booking, local police officers send an arrestee's biometrics to the FBI to check for warrants. As noted previously, all biometrics from Secure Communities jurisdictions are forwarded to DHS, where they will be run through databases that identify previous immigration violators, immigrants with deportable convictions, and visa overstays. If the system indicates the person might be deportable, an officer at ICE's Law Enforcement Support Center (LESC) then issues a detainer or contacts a local ICE field office.[285]

As discussed above, many judges take immigration status into account when assessing flight risk, and many judges consider an immigration detainer to be a signal of flight risk,[286] however erroneous.[287] Even if the judge sets a criminal bond, defendants who can

---

284 *See, e.g.*, DET. WATCH NETWORK, *supra* note 84, at 11, 17, 22 (reporting collaborations between ICE and state probation officers, including a May 2004 incident in New York in which probation officers lured 138 parolees to non-routine appointments where they were arrested and detained by ICE, though none had violated parole requirements); N. MANHATTAN COALITION FOR IMMIGRANT RIGHTS, DEPORTADO, DOMINICANO, Y HUMANO: THE REALITIES OF DOMINICAN DEPORTATIONS AND RELATED POLICY RECOMMENDATIONS 18–19 (2009), *available at* http://www.nmcir.org/Deportado%20Dominicano%20y%20Humano.pdf (describing an incident in which ICE, acting on intelligence from a parole officer, raided at daybreak the home of a man paroled for a minor drug offense and detained him); Appendix, *Partners in Justice Colloquium Transcript*, 30 N.Y.U. REV. L. & SOC. CHANGE 739, 802 (2006) (recounting a statement by an unidentified New York Criminal Court judge that even if judges recommend probation or order a probation report for noncitizens, probation officers sometimes report the defendant to ICE).

285 Corrections officials in locations that are not yet Secure Communities operational can still contact ICE about suspected deportable immigrants. *See* ROSENBLUM & KANDEL, *supra* note 68; Chapin Interview, *supra* note 156 (reporting this happens frequently in Boulder, Colorado, which as of the time of my interview with her was not a Secure Communities jurisdiction).

286 *See, e.g.*, State v. Fajardo-Santos, 973 A.2d 933, 934–35 (N.J. 2009) (upholding judge's decision to triple the bond amount solely because ICE had issued a detainer).

287 Although immigration officers must have a "reason to believe" that the arrestee is a noncitizen, the applicable statute and regulations do not provide an evidentiary standard. Nor is the issuance of detainers limited to those who are actually removable. *See* 8 U.S.C. § 1357(a) (2012). Errors are common, and one study of the Secure Communities Program concluded that approximately 1.6% (3600) of the people detained under the program in 2011 were U.S.

make bail won't be free while the case is pending. Rather, ICE will assume custody and the defendant will then have to pay an additional immigration bond. Immigration judges are authorized to set bonds as low as $1500 but frequently do not.[288] In some jurisdictions immigration bonds average around $10,000.[289] If the noncitizen is charged with a misdemeanor that might be construed as an aggravated felony or drug ground of removal, he or she will be subject to mandatory detention.[290] A competent defender representing a noncitizen with an immigration detainer must assess not just the criminal case, but also the possibility of immigration relief and the likely amount of the immigration bond (or alternatively, whether mandatory detention will be triggered).

When an immigration-neutral plea is not on the table, defendants with immigration detainers are in a tough situation.[291] Those without any immigration relief will almost always plead guilty, even if they might have strong defenses or are innocent of the crime, because fighting the criminal case only increases and prolongs the costs and hardships. Even an acquittal cannot prevent the sanction that defendants care most about—banishment—which, especially in misdemeanor cases, will far outweigh the potential penal sanction.

To illustrate, consider the predicament faced by Carlos, an undocumented client of Violeta Chapin's misdemeanor defense clinic at the University of Colorado Law School.[292] Carlos walked into Whole Foods to use the restroom. After leaving the store, he claimed to have picked up a bag of chips from the sidewalk just outside the doors and began to eat from it before being arrested and charged with shoplifting. Although the clinic felt Carlos had a strong case against the theft charge

citizens. *See* KOHLI ET AL., *supra* note 73, at 4; *see also* Jacqueline Stevens, *U.S. Government Detaining and Deporting U.S. Citizens as Aliens*, 18 VA. J. SOC. POL'Y & L. 606, 607–12, 621–29 (2011) (analyzing data collected by the Florence Project suggesting that up to one percent of "noncitizens" detained by ICE in southern Arizona between 2006 and 2008 were actually citizens).

288 AMNESTY INT'L, *supra* note 178, at 17 (reporting that judges across the country rarely set bonds as low as the minimum of $1500, and the national average is $6000); N.Y. IMMIGRANT REPRESENTATION STUDY, ACCESSING JUSTICE: THE AVAILABILITY AND ADEQUACY OF COUNSEL IN IMMIGRATION PROCEEDINGS 13 (2011), *available at* http://www.cardozolawreview.com/content/denovo/NYIRS_Report.pdf (reporting that judges in New York set immigration bonds at an average of $10,000, despite being authorized to release many individuals on their own recognizance or to set bail as low as $1500).

289 N.Y. IMMIGRANT REPRESENTATION STUDY, *supra* note 288, at 13; *see also* N.Y. IMMIGRANT REPRESENTATION STUDY, FINAL REPORT—STATISTICAL TABLES, tbl.19, *available at* http://www.justice.gov/eoir/reports/FinalReport-NYIR-LOP_TO32-SecD.pdf (2011) (showing that even in attorney-represented bond redetermination cases, most immigration bonds in New York are set at $10,000 or more and can be as high as $50,000).

290 8 U.S.C. § 1226(c)(1)(A).

291 If the prosecutor offers an immigration-neutral plea, the defendant has less to lose by pleading as quickly as possible and focusing on the immigration case. However, any criminal history may affect discretionary relief.

292 Chapin Interview, *supra* note 156. "Carlos" is not the client's real name.

(he had no prior record and his criminal bond was set at an attainable $300), he had been placed under an immigration hold at booking. The likely immigration bond would have been $3000 to $5000, and lacking ten years of continuous presence in the U.S. there appeared to be no relief from deportation. In the end, despite his innocence, Carlos decided the criminal charges weren't worth fighting, since further detention and deportation were inevitable. He took the prosecutor's offer of time-served with no probation to the theft-offense and was deported not long after.

These minor convictions may well foreclose the possibility of deportation relief or future immigration benefits.[293] In Carlos' case, for example, the theft offense conviction virtually guarantees that he will never be able to lawfully return to the United States.[294] Others with misdemeanor convictions might become ineligible for the significant immigration benefits our country regularly extends based on natural disasters or significant political strife in the noncitizen's country of origin.[295] Still others with minor convictions will find ICE prosecutors unwilling to consider softer, discretionary forms of relief from removal such as administrative closure.[296] Typically only those defendants whose cases are thoroughly investigated by counsel with knowledge of immigration law will be aware that they are in a category that provides a path to lawful status (even if only temporarily), or that their other equities would make them good candidates for prosecutorial discretion in immigration proceedings. All of this takes time to assess, and, in addition to the institutional impediments detailed above, counsel may have difficulty convincing the client that it is worth waiting in jail pending investigation.

---

293 *See supra* Part III.B.2 (discussing how minor convictions can foreclose possible waivers and paths to legal immigration status for unauthorized or otherwise deportable noncitizens).

294 A shoplifting conviction is a CIMT, even without jail time, thereby making Carlos inadmissible and, because the offense occurred after October 8, 1998, subject to mandatory detention if attempting reentry. *See* KRAMER, *supra* note 51, at 204–06, 300–03 (discussing case law establishing that shoplifting is a CIMT and the consequences of CIMT convictions).

295 *See* 8 U.S.C. § 1254 (describing requirements for Temporary Protected Status); *id.* § 1254a(c)(2)(B)(i) (providing that noncitizens are ineligible for Temporary Protected Status if convicted of two misdemeanors).

296 For example, noncitizen youth with three or more misdemeanors or a single "significant" misdemeanor also become ineligible for an immigration prosecutorial discretion program implemented by the Obama Administration in 2012 to benefit certain undocumented young people, and agency guidance makes clear that officers can consider any criminal history as a matter of discretion. *See Consideration of Deferred Action for Childhood Arrivals*, U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 61.

IV. IMPLICATIONS FOR CRIMINAL JUSTICE AND IMMIGRATION POLICY

Perhaps the most glaring implication of the above analysis is that defendants are unlikely to be able to plea bargain effectively for immigration-safe outcomes in the very cases where deportation is most disproportionate to the underlying conduct. In *Padilla*, the Supreme Court assumed that noncitizens could to negotiate whether deportation was a proportional outcome in the underlying criminal cases. But the reality is more discouraging. In combination, the lack of attention from counsel and prosecutors, detention and other process costs, and likelihood of contact with ICE produce a system unreceptive to the kind of negotiated, individualized assessment of the equities imagined by the *Padilla* Court.[297]

The structural impediments to effective plea bargaining in misdemeanor court also have implications for the integrity of both criminal justice and immigration law. Most critically, the convergence of immigration enforcement with misdemeanor prosecutions elevates the risk of both unwarranted convictions and unjustified deportations, especially where immigration enforcement programs incentivize choices unrelated to (and even at odds with) evidence or culpability. These implications add critical components to emergent critiques of both misdemeanor and deportation systems, and should inform law reform efforts to ameliorate the pathologies of both systems.

A. *Elevated Risk of Noncitizens Pleading Guilty in Unwarranted Cases*

A growing body of scholarship contends that the misdemeanor system regularly produces unwarranted convictions.[298] Professor Natapoff has levied perhaps the most sustained indictment. She argues that the bread and butter of misdemeanor prosecutions, which follow high volume arrests pursuant to policing strategies like order-maintenance and zero-tolerance—sometimes called "broken windows" policing—regularly produce convictions that are "evidentiarily suspect."[299] Once the machinery of the misdemeanor system begins, with its indifference to guilt, lack of counsel, pretrial detention, repeated court appearances, mass processing, and so on, defendants have significant incentive to plead guilty to lenient penalties. Inevitably, some

---

297 *See also* Zeidman, *supra* note 223, at 210–11 ("No matter how well-intentioned and *Padilla*-inspired an attorney may be, if she is representing close to 1000 people in a year, she either cannot follow the dictates of *Padilla*, or will at most pay lip service to its holding.").

298 *See, e.g.*, King, *supra* note 19; Natapoff, *supra* note 19; Weinstein, *supra* note 2.

299 Natapoff, *supra* note 19, at 1335.

unquantifiable (but non-negligible) percentage of those prosecuted and convicted in this way are innocent.[300]

Misdemeanor convictions against noncitizens are of even more questionable integrity. As discussed above, poverty and detention cut noncitizens off from support networks, potential witnesses, and income that may be critical for their legal defense and family's survival. Language and cultural barriers diminish their ability to negotiate, appeal to empathy, or navigate a successful defense. Noncitizens typically lack knowledge or resources to hold shirking defense lawyers accountable. They may think (and not without justification), that their "outsider" status stacks the criminal justice system against them.

Most critically, potentially deportable noncitizen defendants in petty cases make decisions of great consequence motivated primarily by ICE's access to jails.[301] Defendants facing detention must rapidly evaluate whether to take a plea despite significant information deficits or, by delaying, risk ICE contact. The time-pressure increases the likelihood that the plea will not account for the strength of the prosecutor's case or the noncitizen defendant's prospects for relief from deportation. At bottom, the ICE enforcement initiatives magnify the danger that fear or ignorance will skew innocent defendants' bargaining—one of the most troubling injustices of the plea-bargaining process.[302] For noncitizens, plea bargaining often happens in the shadow not of trial, but of immigration detainers.[303] This influence almost certainly produces unjustified convictions on a regular basis.

In theory, noncitizens, especially those with the possibility of retaining or obtaining lawful status, have more incentive to fight charges (or drive harder bargains) than most misdemeanor arrestees. But if they do not have accurate knowledge about how the potential conviction will affect their immigration status, and most will not, six months of repeated court appearances, possibly while detained, will not seem worth the candle. And as noted, even informed noncitizens may perceive little value in contesting charges and prolonging proceedings.[304] The convergence of federal immigration enforcement programs with state criminal justice systems thus works to quash any added incentives to fight minor charges. Instead, many noncitizens will plea rashly even if the arrest was unlawful, the evidence is weak, or they are innocent of the charge.

---

300 *Id.* at 1337.

301 *See supra* Part III.C.

302 Bibas, *supra* note 124, at 2494–95.

303 *Cf. id.* at 2468 ("Plea bargaining, then, often happens in the shadow not of trial but of bail decisions.").

304 *See supra* Part III.B.3.

Relatedly, the integration of immigration enforcement programs may have implications for the quality of representation that noncitizens in misdemeanor court receive. Communication with noncitizen clients may be difficult, and the collateral immigration issues complicate representation.[305] If it is consistent with effective assistance of counsel to encourage pleas that reduce the possibility of immediate, actual removal, the ICE programs give defense attorneys (and perhaps prosecutors) who would prefer to dispose of cases quickly a powerful tool to encourage clients to plead, and there is less likelihood of accountability in the event of sub-par representation.[306] While presumptively deportable noncitizen defendants prioritize avoiding apprehension by ICE, the guilty pleas that allow them to exit the system may unnecessarily trigger other collateral consequences[307] and lead to additional immigration consequences down the line.[308]

To be sure, there is no evidence that all or even most noncitizen misdemeanants are factually innocent. But the combination of a lack of post-arrest prosecutorial screening and the intense pressures to plead mean that noncitizens can easily end up with convictions even where they are not guilty of the particular offenses charged, or where they were racially profiled or unlawfully searched. Insofar as guilty pleas result from pressures unrelated to evidence and guilt, they are indefensible as a matter of criminal justice. For the deontologist, who advocates that criminal sanctions should be based on retribution and just desert,[309] punishing those who may be innocent is morally impermissible.[310] From a retributivist perspective, the pathologies of misdemeanor court are arguably most problematic for noncitizens because they tend to be more frequently subject to disproportionate penalties imposed on the basis of the unjustified minor convictions than are citizens.[311] For the consequentialist, who prioritizes minimizing the social costs of crime, punishing defendants who have in fact observed the penal law

---

305 *See supra* Part III.B.2 (discussing how language and cultural barriers can complicate representation of immigrant clients).

306 *See supra* notes 277–283 and accompanying text (discussing New York State cases finding counsel provided effective assistance where their clients took pleas that kept them out of pretrial detention and thereby avoided detection and actual deportation).

307 *See, e.g.*, Joy Radice, *Administering Justice: Removing Statutory Barriers to Reentry*, 83 U. COLO. L. REV. 715, 717 (2012); Roberts, *supra* note 19, at 298–302.

308 *See infra* notes 331–337 and accompanying text.

309 Gerard V. Bradley, *Retribution: The Central Aim of Punishment*, 27 HARV. J.L. & PUB. POL'Y 19, 22–26 (2003).

310 *See, e.g.*, Joshua Dressler, *Hating Criminals: How Can Something that Feels So Good Be Wrong?*, 88 MICH. L. REV. 1448, 1451 (1990) (reviewing JEFFRIES G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY (1988)) ("[J]ust deserts is a necessary condition of punishment.").

311 This will not always be the case, of course, as losing eligibility for public housing, termination of parental status, loss of professional licenses, and inability to gain employment can also be highly disproportional consequences that can follow minor convictions. *See* Roberts, *supra* note 19, at 298–302.

undermines incentives to comply with legal rules.[312] Indeed, as increasing numbers of misdemeanor defendants (noncitizen or otherwise) plead guilty for reasons other than individual culpability, the petty prosecution system's legitimacy erodes.[313]

B. Elevated Risk of Unchecked Rights Violations and Jurisdictional Disparities In Criminal and Immigration Enforcement

Modern policing strategies tend to result in disproportionate arrests of people of color, particularly blacks and Latinos.[314] The immigration enforcement programs magnify the already prevalent risk of rights violations in petty offense arrests due to racial profiling. A number of recent reports suggest correlations between racial profiling and the ICE initiatives that give state and local officers a role in federal immigration enforcement.[315] Immigrants may thus be particularly likely to have been arrested for illegitimate reasons.

As a result of the institutional culture of district attorney's offices in many jurisdictions, even noncitizen defendants who have been racially profiled, or arrested for minor offenses on less than probable cause, will likely face charges. But the distorting effect that the immigration enforcement programs can have on plea incentives in low-level prosecutions suggests that noncitizens will be deterred from challenging unconstitutional policing even in egregious cases. This has implications for society more broadly, because the ability of individuals to assert their rights is critical for reforming unlawful arrest practices.

---

312 *See* Guttel & Teichman, *supra* note 263, at 608–09 (discussing the consequentialist theory of punishment and explaining that "[f]rom a consequentialist approach, penalizing the innocent undercuts the goal of minimizing the social costs of crime"); Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307, 348–52 (1994) (demonstrating that penalizing innocent defendants undermines deterrence goals of punishment).

313 *See* Natapoff, *supra* note 19, at 1319 ("Because the misdemeanor world is so large, its cultural disregard for evidence and innocence has pervasive ripple effects, not the least of which is the cynical lesson in civics that it teaches millions of Americans every year.").

314 *See supra* notes 124–25 and accompanying text.

315 *See, e.g.*, AGUILASOCHO ET AL., *supra* note 246, at 16–18 (noting increased racial profiling in policing following the implementation of the Secure Communities program); GARDNER II & KOHLI, *supra* note 142, at 1 ("[I]mmediately after Irving, Texas law enforcement had 24-hour access . . . to ICE in the local jail, discretionary arrests of Hispanics for petty offenses—particularly minor traffic offenses—rose dramatically."); Ball, *supra* note 142 (reporting that following a DOJ report accusing Alamance County, North Carolina deputies and Sheriff Terry Johnson of biased policing, ICE terminated the section 287(g) program in the county); Lydersen, *supra* note 142 (reporting that Arizona's section 287(g) program was revoked following a DOJ investigation finding that Maricopa County Sheriff Arpaio engaged in pervasive racial profiling); Ruiz, *supra* note 142 (describing the section 287(g) program as "synonymous with racial profiling"); *see also* NAT'L IMMIGRATION PROJECT, *supra* note 276, at 7 ("[I]t is now common practice for 287(g) police/jail officers and ICE agents to simply place detainers on anyone in criminal custody who has admitted to being foreign-born . . . .").

Once the prosecution apparatus begins, factors like race, language, and immigration status continue to affect the operation of the criminal justice system for noncitizens, influencing custody determinations, selection for immigration detainers, and quality of representation. Thus, although race, national origin, and immigration status should be irrelevant to criminal justice,[316] in minor cases such factors contribute to inequities for noncitizens from arrest to conviction.

Furthermore, predicating removal on minor convictions allows significant disparities in outcomes for similarly situated defendants both within and across states. Indeed, the fact that some local prosecutors and defenders will be attuned (and sympathetic) to disproportionate immigration consequences, while others will not, creates a pattern of immigration enforcement across jurisdictions that bears little relation to the federal government's expressed policy goals, or to notions of fairness and proportional justice.[317] Instead, patterns of detention and deportation will turn on the indigenous policies of local enforcement agencies and prosecutors' offices, funding realities affecting the provision of counsel to the indigent, the institutional capacities of local defender organizations, and the implementation of enforcement programs that give ICE access to information about noncitizen defendants.

While local prosecutorial policies affecting charging and bargaining will result in disparities across jurisdictions for all levels of offenses, the differences may be more extreme in non-federal petty cases. First, all felony defendants will at least be entitled to counsel if they cannot afford an attorney.[318] Unlike many misdemeanor prosecutions, then, felonies will generally be subject to "the crucible of meaningful adversarial testing."[319] Second, prosecutors screen serious offenses more thoroughly at the charging stage. They tend to take the time to evaluate the strength of felony cases and decline felony prosecutions at much higher rates than with misdemeanor charges. Felonies are labor intensive, more complex, and more likely to be contested. Felony arrests also do not tend to result from the same sort of public order policing strategies that so frequently correlate with racial disparities. Finally, the grand jury process provides an important additional check on felony prosecutions.

---

316 *See* Wong Wing v. United States, 163 U.S. 228 (1896) (holding that the government may not afford fewer criminal protections on the basis of alienage or race).

317 Thanks to Issa Kohler-Hausmann for her contribution to this insight. For further discussion of the proportionality implications, see *infra* Part IV.C.

318 *See* Gideon v. Wainwright, 372 U.S. 335 (1963).

319 United States v. Cronic, 466 U.S. 648, 656 (1984); *see also* Argersinger v. Hamlin, 407 U.S. 25, 34 (1972) ("Counsel is needed so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution.").

C. *Elevated Risk of Unjustified Immigration Penalties on the Basis of Unreliable Misdemeanor Convictions*

A number of commentators have begun to propose reforms and legal challenges to address the disproportionate consequences that follow inclusion of minor offenses in the INA's deportation categories.[320] Michael Wishnie, for example, has argued that the Fifth and Eighth Amendments constrain the imposition of the severe (and cumulative) penalties of deportation and prohibition from lawful reentry.[321] He suggests that noncitizens raise constitutional challenges to the proportionality of their removal orders.[322] Others, like Juliet Stumpf and Angela Banks, have argued for legislative changes to calibrate immigration sanctions to the degree of the noncitizen's underlying civil or criminal offense.[323] Shoba Sivaprasad Wadhia, in turn, has focused on how improvements to ICE's exercise of prosecutorial discretion at the federal level might ameliorate disproportionate outcomes.[324]

The proportionality critique underappreciates the scope of the problem. The current deportation scheme's unfairness lies not just in the lopsided severity of imposing banishment on the basis of minor convictions with little ex-post discretion to consider the noncitizens' equities. Rather, there is insufficient guarantee that noncitizen misdemeanants are legally or even factually guilty of the particular offenses used to justify deportation or exclusion. The broad categories of deportable offenses, assembly-line processing in many lower criminal courts, blunt efforts to enforce immigration laws, and limited post-conviction discretionary relief converge to generate a high likelihood of unwarranted removals on the basis of convictions that do not reliably indicate guilt.

Criminality has long been a basis for deportation.[325] Yet for a hundred years, Congress's judgment has been to require a formal conviction rendered in a court of law, which has well-established constitutional safeguards for criminal defendants and strict evidentiary

---

320 *See, e.g.*, Wishnie, *supra* note 201.

321 *Id.*

322 *Id.*

323 *See* Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1732–40 (2009) (arguing for enactment of a graduated range of immigration penalties according to the seriousness of the underlying immigration offense); Angela M. Banks, *The Normative & Historical Cases for Proportional Deportation*, EMORY L.J. (forthcoming 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2044801 (arguing that returning to the foundational principle of proportionality in immigration law would require recognizing the removal of green-card holders on the basis of minor crimes as excessive).

324 Wadhia, *supra* note 101, at 294–99.

325 *See* Immigration Act of 1917, Pub. L. No. 64-301, 39 Stat. 874 (codified as amended in scattered sections of 8 U.S.C.) (providing for deportation on the basis of crimes involving moral turpitude committed within five years of entry).

requirements, all of which are designed to ensure that individual prosecutions are meritorious and that guilt is reliably adjudicated.[326] While Congress has gradually, and sometimes dramatically, expanded the categories of deportable convictions that sweep in minor offenses, it has thus far eschewed the route of statutorily reducing the indicia of criminality required to trigger deportability. The few exceptions to the conviction requirement for deportation of lawfully present noncitizens—human traffickers, drug abusers or addicts, terrorists—prove the rule.[327] In these extremely limited (and rarely relied upon) exceptions, noncitizens may be deported on an administrative finding of criminality, with relaxed rules of evidence, and no right to counsel.[328] Outside of these exceptions, then, Congress long made clear that lawful, permanent members of our society should only lose that status on the basis of criminal wrong-doing when we are very sure they in fact did something wrong.

While commentators have proffered various justifications for using criminal convictions as a basis for imposing immigration consequences, the core of each theory is that convictions are a proxy for social desirability.[329] But whatever the merits of that proxy in general, the

---

326 *See, e.g.*, *In re* Eslamizar, 23 I. & N. Dec. 684, 687–88 (B.I.A. 2004) (holding that Congress did not want immigration consequences triggered by convictions rendered in proceedings that do not "provide[] the constitutional safeguards normally attendant upon a criminal adjudication").

327 A noncitizen is subject to the human trafficking deportability ground merely on the basis of knowledge or "reason to believe" on the part of the consular officer, Secretary of Homeland Security, Secretary of State, or Attorney General. *See* 8 U.S.C. § 1227(a)(2)(F) (2012) (incorporating 8 U.S.C. § 1182(a)(2)(H)). Similarly, a noncitizen found to engage in terrorist activities or conduct implicating national security grounds, *see id.* §§ 1227(a)(4)(A)–(B), or "who is, or at any time after admission has been, a drug abuser or addict" is deportable even in the absence of a conviction, *see id.* 1227(a)(2)(B)(ii). Finally, noncitizens who were inadmissible at time of entry under 8 U.S.C. § 1227(a)(1)(A) are deportable without a conviction.

328 The removal charge most relevant here, regarding drug abusers and addicts, is exceedingly rare. Drug abuse or addiction has been a ground of deportability in various forms since 1952. *See* Immigration and Nationality Act of 1952 § 241(11), Pub. L. No. 82–414, 66 Stat. 163, 206 (codified as amended at 8 U.S.C. § 1227(a)(2)(B)(ii)) (providing for the deportation of any alien who "is, or hereafter at anytime after entry has been, a narcotic drug addict"). Nevertheless, research discloses only one reported decision in which the government relied on this ground to deport a noncitizen. *See* McJunkin v. Immigration & Naturalization Serv., 579 F.2d 533, 536 (9th Cir. 1978) (holding that deportation on grounds of drug addiction does not constitute cruel and unusual punishment). A few unpublished administrative decisions show that ICE intermittently lodges the drug abuse ground under 8 U.S.C. § 1227(a)(2)(B)(ii) in deportation cases, along with conviction-based grounds of removability, but the drug abuse charge is invariably withdrawn or not sustained. *See, e.g.*, *In Re* Dong Qiu, 2004 WL 1398756 (B.I.A. 2004). Finally, removal statistics published by DHS and TRAC do not indicate any use of this ground of deportation in recent years. *See* OFFICE OF IMMIGRATION STATISTICS, *supra* note 24, at 1, 6 tbl. 7; *Deportation Orders Sought in Immigration Court Based on Alleged Criminal Activity by Type*, TRAC IMMIGRATION, *supra* note 99.

329 *See* Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105, 125–30 (2012) (discussing various theories proffered by

reliability of convictions as indicia of culpability sufficient to warrant banishment begins to crumble when applied to misdemeanants. The categories of deportable convictions that sweep in minor offenses can no longer be seen as bright lines clearly delineating undesirable noncitizens. Deportations predicated on misdemeanor convictions now cannot be justified as based on reliable evidence of criminality, because petty convictions now convey next to nothing about whether the immigrant did something normatively wrong.

As this Article shows, then, deportations that follow the outcomes of non-federal misdemeanor prosecutions erode Congress's century-long judgment that deportation be predicated on a criminal conviction rather than some lesser finding of criminal conduct. Not only does the severity of deportation outweigh the gravity of most minor convictions, such convictions frequently result from processes "badly detached from the core legitimating precept of individual fault."[330] Once noncitizens enter the criminal justice system, the odds of being funneled to deportation proceedings through federal enforcement programs are high. Inevitably, the government deports many noncitizens, including those with lawful status and substantial community ties, on the basis of minor crimes of which the individual should not have been convicted.

Even when noncitizens are able to exit the criminal justice system without ICE apprehension, their guilty pleas may lead to immigration consequences further down the line. LPRs with minor convictions, for example, may be subject to inadmissibility grounds if they travel abroad, or may become ineligible for naturalization or discretionary relief should they later end up in removal proceedings.[331] As noted, certain unauthorized noncitizens may be eligible to regularize their status on the basis of strong community and family ties in this country,[332] dangerous conditions they would face in their country of origin,[333] or other grounds.[334] But misdemeanor convictions generally foreclose these possibilities for avoiding deportation or regularizing immigration

commentators to explain or justify using contact with criminal justice systems as a proxy for immigrant undesirability).

330 Natapoff, *supra* note 19, at 1319.

331 *See supra* Part III.B.2.

332 *See, e.g.*, 8 U.S.C. § 1182(a)(9)(B)(v) (waiver of unlawful presence bars for beneficiaries of family petitions on the grounds that inadmissibility would cause qualifying U.S. relatives extreme hardship); *id.* § 1229b(b)(1) (providing for cancellation of removal for non-LPRs).

333 *See, e.g.*, *id.* § 1158 (asylum); *id.* § 1254 (temporary protected status).

334 *See, e.g.*, Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449, 1463–66 (2006) (describing potential visas available to undocumented noncitizens who are victims of serious crime in this country); *Consideration of Deferred Action for Childhood Arrivals Process*, U.S. CITIZENSHIP & IMMIGRATION SERVS., *supra* note 61 (setting forth DHS policy granting a two-year renewable reprieve from deportation, along with lawful authority to work and other benefits, to undocumented immigrants under the age of thirty who were brought to the United States when very young and who are currently in school or have a diploma or GED).

status.[335] The convergence of immigration enforcement with the criminal justice system thus creates a vicious cycle, squeezing out much of what mitigating and humanitarian concerns remain in current immigration law as noncitizens facing untenable choices attempt to exit the misdemeanor criminal justice system as rapidly as possible.

While *Padilla*'s Sixth Amendment rule on its face applies only to deportation consequences that automatically follow guilty pleas, proportionality concerns are also raised when petty convictions create inadmissibility bars, or foreclose the possibility of paths to lawful status or discretionary relief from removal that would otherwise have been available.[336] Regardless of whether constitutional effective assistance of counsel encompasses advice about immigration consequences beyond deportation,[337] the severity of such sanctions can vastly exceed the gravity of misdemeanor offenses, particularly where there are good reasons to question the underlying conviction. At rock bottom, the legitimacy of deporting or denying admission to a noncitizen on the basis of criminality turns on the reliability of the evidence of that individual's wrong-doing. Misdemeanor convictions are increasingly unreliable indicia of culpability and social desirability.

V. TOWARDS REFORM

My primary aim in this Article has been to show how the deportation and misdemeanor prosecution systems interact to produce graver injustices than observers have previously understood. Truly meaningful reforms at the state or federal level must account for these underappreciated consequences of current deportation policy, and the significant impact on noncitizen misdemeanor defendants and local justice systems. Here I will briefly evaluate a few possibilities that might address the problems raised by the interaction between federal immigration policies and state misdemeanor prosecutions.

---

335 *See supra* Part III.B.2.

336 *See* Smyth, *supra* note 194, at 146–50 (arguing that the harshness and intractability of immigration law has given rise to a "practical imperative" to ensure that immigrants who enter the state criminal justice system receive fair outcomes and equitable consideration); Wishnie, *supra* note 201, at 431–35 (arguing that bars to lawful reentry based on convictions or immigration violations raise proportionality concerns).

337 *See* Vartelas v. Holder, 132 S. Ct. 1479, 1492 n.10 (2012) ("Armed with knowledge that a guilty plea would preclude travel abroad, aliens like Vartelas might endeavor to negotiate a plea to a nonexcludable offense—in Vartelas' case, *e.g.*, possession of counterfeit securities—or exercise a right to trial."); INS v. St. Cyr, 533 U.S. 289, 322–25 (2001) (holding that noncitizens pleading guilty have a reliance interest in expected eligibility for discretionary relief from deportation); Janvier v. United States, 793 F.2d 449, 455 (2d Cir. 1986) (suggesting that the right to effective assistance of counsel includes assistance in seeking a discretionary judicial recommendation against deportation).

To be sure, reforms at the federal level could eliminate the root causes of much of the misdemeanor crisis for noncitizens. If Congress were to legislatively remove or reduce the immigration consequences of minor convictions—for example by explicitly defining aggravated felonies or crimes involving moral turpitude to exclude misdemeanors—the most disproportional outcomes could be avoided. Legislation along these lines would have two beneficial effects in misdemeanor court. First, if deportation is no longer a common result of petty offenses, less is at stake for noncitizens when the system gets it wrong.[338] Second, legislatively defining removable offenses to exclude all or most misdemeanor convictions would allow noncitizens, especially lawful permanent residents, to exercise their right to fight minor criminal charges or to litigate unconstitutional arrests without risking a conviction that could result in mandatory detention and ultimately deportation.[339]

Congress could also restore opportunities for state or federal adjudicators to exercise post-conviction discretion to mitigate immigration consequences in appropriate cases. For example, as immigration law becomes increasingly intertwined with criminal justice systems it may make sense to give trial judges the authority to make recommendations against deportation, especially in plea-bargain cases where counsel is not appointed.[340] The over-inclusive dragnet created by the convergence of immigration enforcement and criminal law also supports an expansion of immigration judge discretionary authority, to account for cases where the enforcement scheme results in manifest disproportionality.[341] Additionally, Congress could clarify that all convictions pardoned or expunged by states are no longer deportable offenses, so that states could correct injustices in the most egregious cases and reward those who have clearly rehabilitated.[342] While these reforms would not remove the risk that a noncitizen might face deportation based on a minor conviction for a crime she did not commit, they would at least allow more opportunities for the

338 Of course, federal immigration legislation would address only one (highly significant) collateral consequence of the misdemeanor system. The general critique of the integrity and social consequences of misdemeanor convictions would remain. Still, removing the negative immigration outcomes that can follow petty offenses would largely ensure that at least lawfully present immigrants are in no worse position than misdemeanor defendants who are U.S. citizens.

339 *Cf.* Roberts, *supra* note 261, at 10–11 (arguing that if more misdemeanor defendants choose trial over a guilty plea, especially in targeted types of cases, the system might internalize the true costs of exploding misdemeanor prosecutions and reform in beneficial ways).

340 *See supra* notes 63–64 and accompanying text (discussing JRADs).

341 *But cf.* Wishnie, *supra* note 201, at 441–45 (arguing that immigration judges already have authority under 8 U.S.C. § 1229a(c)(1)(A) to conduct a proportionality review of a removal order).

342 *See generally* Cade, *supra* note 52.

consideration of equitable or mitigating factors. Other meaningful possibilities for federal reform include amending the INA to provide that deportation consequences not be imposed on the basis of convictions where there was no right to counsel in the criminal proceeding. The INA could also be amended to allow defendants to enter state diversionary programs in minor cases without fear of deportation. While immigration law tends to be particularly entrenched and subject to political gridlock,[343] significant federal legislative reform appears a more realistic possibility following the 2012 reelection of President Obama.[344] Indeed, the growing state and local level reforms discussed below may coalesce as a catalyst for legislative amendments to the INA. On the other hand, federal immigration reforms that significantly benefit noncitizens with criminal history remain less likely.[345] As of the time editing for this Article concluded, none of the legislative reforms I have suggested here appear to be under consideration by Congress.

The executive branch could also take actions that would ameliorate some of the corrosive effects of the ICE jail immigration enforcement programs. While such voluntary restriction has seemed unlikely in view of the political economy of immigration enforcement against noncitizens encountering the criminal justice system, the Obama Administration has demonstrated more recently that it is sometimes willing to tolerate fewer apprehensions of deportable noncitizens where there are high collateral costs to justice. For instance, the federal government has terminated or modified immigration enforcement programs where the DOJ has found evidence of local discriminatory policing practices against immigrants.[346]

---

343 *See* Mariano-Florentino Cuéllar, *The Political Economies of Immigration Law*, 2 U.C. IRVINE L. REV. 1 (2012) (describing how the various dynamics producing the structure of modern immigration law create powerful obstacles to legislative change); Wishnie, *supra* note 201, at 416–17.

344 *See, e.g.*, Julia Preston, *Senators Offer a New Blueprint for Immigration*, N.Y. TIMES, Jan. 28, 2013, at A1.

345 *See, e.g.*, Alan Gomez, *White House Immigration Plan Offers Path to Residency*, USA TODAY (Feb. 17, 2013), http://www.usatoday.com/story/news/nation/2013/02/16/obama-immigration-bill/1925017 (reporting that noncitizens would be ineligible for the Obama Administration's proposal for a legalization program if "convicted of a crime that led to a prison term of at least one year, three or more different crimes that resulted in a total of 90 days in jail, or if they committed any offense abroad that if committed in the United States would render the alien inadmissible or removable from the United States" (internal quotation marks omitted)).

346 *See, e.g.*, Ball, *supra* note 142 (reporting that following a DOJ report accusing Alamance County, North Carolina deputies and Sheriff Terry Johnson of biased policing, ICE terminated the section 287(g) program in the county); Lydersen, *supra* note 142 (reporting that Arizona's section 287(g) program was revoked following a DOJ investigation finding that Maricopa County Sheriff Arpaio engaged in pervasive racial profiling); Press Release, Office of Pub. Affairs, U.S. Dep't of Justice, Justice Dep't Releases Investigative Findings on the Alamance

On December 21, 2012, John Morton issued a new memorandum purporting to bring the use of detainers in line with the priorities for immigration enforcement previously expressed in the DHS policy memoranda issued in 2010 and 2011.[347] The 2012 memo asks ICE agents and officers (but not CBP agents) to refrain from issuing detainers in criminal cases in certain circumstances.[348] It remains to be seen, of course, whether this policy will be ignored on the ground level, just as the prior top-down prosecutorial discretion memoranda largely have been.[349] Even assuming good faith, the guidance offered in the new detainer directive is vague and offers enough loopholes that its practical effect is in some doubt. Nevertheless, if sufficient political pressure is exerted in light of the negative consequences of ICE programs for the integrity of criminal justice systems, DHS might determine that further, more specific modifications of the detainer programs are warranted. Perhaps as more jurisdictions enact policies that resist compliance with detainers,[350] especially where issued against noncitizens not charged with serious offenses, the federal government will continue to revise its enforcement policies with an eye towards fostering cooperation rather than dissonance with local jurisdictions.

At least in the short term, however, measures to address the plea-bargain crisis for noncitizens in misdemeanor court are most likely to occur at the local level (if at all), including decriminalization of some petty offenses, more robust misdemeanor defense, and detainer-resistance policies. As scrutiny of the pathologies of the misdemeanor system—including the disproportionate collateral consequences that follow minor convictions—continues to mount, the idea that the institutional actors in lower courts will recalibrate becomes more realistic. While most of the burden inevitably falls on misdemeanor defense attorneys, top-down policies in prosecutors' offices and more nuanced training might address some of the problems at the discretionary point of charging. Prosecutors could be trained to more explicitly think about the equities and consider the proportionality of deportation.[351] As a default posture in cases where the defendant is unrepresented, prosecutors could have a roster of immigration-safe

---

Cnty., N.C., Sheriff's Office (Sept. 18, 2012), http://www.justice.gov/opa/pr/2012/September/12-crt-1125.html.

347 *See* Memorandum from John Morton, Dir., U.S. Immigrations & Customs Enforcement, Civil Immigration Enforcement: Guidance on the Use of Detainers in the Federal, State, Local, and Tribal Criminal Justice Systems (Dec. 21, 2012), *available at* https://www.ice.gov/doclib/detention-reform/pdf/detainer-policy.pdf.

348 *Id.* at 2.

349 *See supra* Part I.B.

350 *See infra* text accompanying notes 364–368.

351 *See* Altman, *supra* note 118, at 34–38 (arguing that post-*Padilla*, prosecutors have a duty to pursue criminal dispositions with proportional immigration outcomes).

pleas to offer.[352] Admittedly, "immigration-safe" pleas are something of a moving target because Congress can make immigration consequences retroactive.[353] Additionally, deportability may depend on facts about the defendants' situation that are unknown to prosecutors. Still, attempting to offer safe pleas is preferable to a system in which prosecutors negotiate pleas with unrepresented defendants without taking the potential immigration consequences into account.

In any event, prosecutors should more frequently decline prosecution of cases that arise out of indiscriminate public-order policing or where racial profiling appears likely.[354] Defense attorneys need to push harder and more frequently for immigration-safe pleas, which inevitably means they must be willing (and able) to take more misdemeanor cases to trial.[355] Judges should ensure that defendants have more information about the strength of the prosecutors' cases before they plea. Strengthening the defendants' hands by increasing their access to information (and to a tougher misdemeanor defense bar) is likely to lead prosecutors to exercise more charging discretion, and may ultimately influence arrest discretion. While these sorts of systemic changes may never be implemented on a wide-scale, they are worthy of further exploration, and with increased attention paid to lower courts they may no longer be beyond the realm of possibility in some jurisdictions.

Decriminalization of low-level offenses would also address many of the problems with misdemeanor courts, and not just for noncitizens.[356]

---

352 It is possible that trial judges may want a record of any plea offers in the wake of the Supreme Court's recent plea-bargain jurisprudence. *See Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012) (requiring that defendants be informed about any potentially beneficial plea offers from the prosecution); *Lafler v. Cooper*, 132 S. Ct. 1376, 1390–91 (2012) (holding that defense counsel's incompetent advice about the merits of taking a particular plea offer establishes prejudice); *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486–87 (2010) (holding that defendants have a constitutional right to advice about the deportation consequences of convictions). *See generally* Roberts, *Effective Plea Bargaining Counsel*, *supra* note 121, at 22–23 (explaining judicial incentives following *Padilla*, *Lafler*, and *Frye* to investigate the content of plea negotiations). It remains to be seen whether the Court's increased willingness to police the content of plea negotiations will filter down to uncounseled misdemeanor proceedings.

353 *See, e.g.*, IIRIRA, Pub. L. No. 104-208, div. C, § 321(b), 110 Stat. 3009-627, 3009-628 (1996) (making the aggravated felony ground of removal retroactive to cover all crimes within the definition irrespective of the date of commission).

354 ICE prosecutors should also decline to prosecute in immigration court where there is evidence that noncitizens, especially LPRs, were apprehended through unconstitutional policing strategies. *See, e.g.*, Billy Ball, *Marty Rosenbluth: Fighting for the Rights of Undocumented Immigrants*, INDY WEEK (Jan. 30, 2013), http://www.indyweek.com/indyweek/marty-rosenbluth-fighting-for-the-rights-of-undocumented-immigrants/Content?oid=3255480 (reporting that ICE prosecutors in North Carolina immigration court "dropped dozens of cases" against undocumented noncitizens who had been racially profiled, most egregiously in Alamance County).

355 *See* Roberts, *supra* note 261.

356 *See* Jack Healy, *Voters Ease Marijuana Laws in 2 States, but Legal Questions Remain*, N.Y. TIMES, Nov. 8, 2012, at P15 (reporting that the successful decriminalization in 2012 of personal

Decriminalization (in contrast to simply reducing penalties) would prevent minor offenses from triggering most (but not all) negative immigration consequences.[357] As Jenny Roberts observes, decriminalization also has the advantage of ameliorating the problem of overloaded defender systems.[358] Civil offenses, however, can still lead to discretionary denials of immigration relief.[359] Civil offenses might also remain a problem for LPRs who leave the country and become subject to inadmissibility grounds that do not require an actual conviction.

On the other hand, movements to reduce penalties for misdemeanors (but not actual decriminalization) present a mixed bag for noncitizens. The principle policy rationale advanced for non-incarcerative penalties for minor crimes appears to be that more of the limited funding for provision of criminal defense could then be allocated to felony representation.[360] Some cities and states have implemented policy changes along these lines.[361] But reforms that do no more than reduce penalties are of limited benefit to noncitizen defendants because convictions can still trigger immigration consequences. On the plus side, lesser penalties could help noncitizens avoid certain minor convictions classified as aggravated felonies or crimes involving moral turpitude.[362] But where such reforms result in reduced access to counsel, noncitizens will be much less likely to

---

marijuana possession in Colorado and Washington, would, in the view of the ballots' supporters, "end thousands of small-scale drug arrests while freeing law enforcement to focus on larger crimes" and "save court systems and police departments additional millions").

357 For decriminalization to be effective for noncitizens, the burden of proof should be less than beyond a reasonable doubt. *See In re* Eslamizar, 23 I. & N. Dec. 684, 687–88 (B.I.A. 2004) (holding that convictions obtained through a preponderance of the evidence standard are not sufficiently criminal to trigger immigration consequences). This is not to say that statutorily reducing penalties would be of no use to noncitizens charged with petty offenses. For example, as discussed *supra* Part II.B, reducing the sentences for all misdemeanors to be less than one year would help noncitizens avoid the aggravated felony category of removal.

358 Roberts, *supra* note 19, at 303, 331–33.

359 A number of immigration benefits and forms of relief from removal, like naturalization, cancellation of removal, or adjustment of status based on humanitarian grounds, such as the Violence Against Women Act, can be denied if the noncitizen is determined to lack "good moral character." *See, e.g.*, 8 U.S.C. § 1101(f) (2012) (describing non-exhaustive grounds for finding that a person does not have good moral character for the purposes of immigration and naturalization); Clapman, *supra* note 20, at 616 n.175.

360 *See, e.g.*, Hashimoto, *supra* note 19, at 497–99 (proposing states deal with resource issues by amending penal statutes to require counsel only when there is a constitutional right and then eliminating imprisonment penalties for minor offenses); *see also* Benjamin H. Barton & Stephanos Bibas, *Triaging Appointed-Counsel Funding and Pro Se Access to Justice*, 160 U. PA. L. REV. 967, 985–91 (2012) (arguing for more institutional facilitation of pro se access to courts so that limited funding can be allocated to serious criminal matters like complex felonies).

361 *See, e.g.*, Alex Kreit, *The Decriminalization Option: Should States Consider Moving from a Criminal to a Civil Drug Court Model?*, 2010 U. CHI. LEGAL F. 299, 325 (listing states considering reforms to drug policies).

362 *See* 8 U.S.C. §§ 1101(a)(43)(F)–(G) (including crimes of violence or theft within the category of aggravated felony if the term of imprisonment imposed is at least one year); *id.* § 1227(a)(2)(A)(i) (requiring possibility of one-year sentence for crimes of moral turpitude).

become aware of the removal consequences that may still follow other minor offenses.[363]

Regardless, systemic changes to the norms of the misdemeanor system like these, while critical, will not adequately address the justice-undermining incentives created by the intimate integration of immigration enforcement with the criminal justice process. Even with the assistance of a competent lawyer and accurate information about immigration consequences, the presence or threat of detainers will lead many noncitizens to throw in the towel despite unmeritorious grounds for a conviction. One possible measure local and state governments can take to ensure the integrity of criminal justice for noncitizens, then, is to enact measures to resist immigration detainers in at least some circumstances. A handful of jurisdictions, including major urban centers like New York City, Milwaukee, Chicago, and Baltimore, have begun to implement such detainer-resistance policies to varying degrees—and with varying levels of push-back from the federal government[364] and local police.[365] California's Governor Brown recently vetoed a bill that would have limited compliance with immigration detainers throughout the state, though he also noted that "federal agents shouldn't try to coerce local law enforcement officers into detaining people who've been picked up for minor offenses and pose no reasonable threat to their community."[366] Following Governor Brown's veto, California Attorney General Kamala Harris issued statewide guidance opining that detainers are not mandatory and instructing law

---

363 *See generally* Clapman, *supra* note 20, at 590–98.

364 ICE Director John Morton informed Cook County, Illinois, officials, for example, that the ordinance violates federal law and threatened to block federal money owed to the county through an entirely separate program. *See* Letter from John Morton, Dir., U.S. Immigration & Customs Enforcement, to Toni Preckwinkle, President, Cook County Board of Commissioners (Jan. 4, 2012), *available at* http://www.immigrationpolicy.org/sites/default/files/docs/Morton-Letter-to-Preckwinkle-01-04-2012.pdf; *see also* Ben Winograd, *ICE Distorts Facts in Debate over Immigration Detainers*, IMMIGRATION IMPACT (Mar. 1, 2012), http://immigrationimpact.com/2012/03/01/ice-distorts-facts-in-debate-over-immigration-detainers (discussing subsequent activities).

365 *See, e.g.*, Antonio Olivo, *Feds Seek Compromise on Cook County Immigration Ordinance*, CHI. TRIB., Feb 29, 2012, http://articles.chicagotribune.com/2012-02-29/news/ct-met-cook-county-immigration-ordinance-0229-20120229_1_illegal-immigrants-ice-detainers-immigration-enforcement-agency (describing resistance to the law by "Sheriff Tom Dart and others [who] expressed concerns that illegal immigrants arrested for murder, assault and other major crimes were being allowed to walk free—some going on to commit more crimes"); Larry Sandler, *Abele Switches Stand on Immigration Policy for Inmates*, MILWAUKEE J. SENTINEL, June 4, 2012, http://www.jsonline.com/news/milwaukee/abele-switches-stand-on-immigration-policy-for-inmates-7q5lkh3-157060355.html (reporting that in Milwaukee the sheriff vowed to resist the resolution and continue cooperating with ICE).

366 *See* Elise Foley, *TRUST Act Vetoed: California Gov. Jerry Brown Calls Limits on Immigration Enforcement 'Flawed*,' HUFFINGTON POST, Oct. 1, 2012, http://www.huffingtonpost.com/2012/10/01/trust-act-veto-jerry-brown_n_1928444.html (quoting Jerry Brown, Governor, California).

enforcement to use discretion when determining whether to comply with requests.[367]

While helpful to certain categories of noncitizen defendants, thus far most of these resistance policies contain exceptions that do not entirely eliminate the pressure they exert on noncitizens to plead guilty. Still, as additional jurisdictions adopt detainer resistance measures, we may see the rise of more widespread resistance to the ramped-up federal enforcement efforts, which could encourage the federal government to reform its current approach to immigration enforcement. It is also possible that lawsuits challenging the legality of detainers will result in some systemic reforms.[368] Indeed, the concerns raised by local governments and civil liberties advocates have already influenced the federal government's detainer policies to some degree.[369] The most recent Morton memo on the issuance of detainers, for example, appears to be an accommodating response to local resistance measures.[370] Nevertheless, it would be naive to predict a significant reduction in the integration of immigration enforcement with criminal justice systems in the near future.[371]

CONCLUSION

Scholars, policy makers, and courts have failed to adequately appreciate the degree to which current immigration policies impact noncitizens arrested for misdemeanors. As this Article has endeavored to show, the "creative" plea bargains envisioned by *Padilla* are unlikely to occur in the petty cases where they should be most successful. The misdemeanor system, especially when coupled with aggressive

---

367 *See* Lee Romney & Cindy Chang, *U.S. Program Called Optional: Attorney General Says Secure Communities Has Swept Up Too Many Non-Criminals*, L.A. TIMES, Dec. 5, 2012, at 1.

368 *See, e.g.*, Thomas MacMillan, *"Secure Communities" Suffers a Setback*, NEW HAVEN INDEPENDENT (Feb. 19, 2013), http://www.newhavenindependent.org/index.php/archives/entry/activists_announce_a_victory_against_secure_communities (reporting that in settlement to resolve a lawsuit brought by a clinic at Yale Law School, the Connecticut Department of Corrections agreed to review immigration detainer requests on a case-by-case basis, a policy that shortly "resulted in a 70 percent drop in the number of Connecticut residents turned over to ICE"). *See generally* Legal Action Center, *Challenging the Use of ICE Immigration Detainers*, AM. IMMIGRATION COUNCIL, http://www.legalactioncenter.org/clearinghouse/litigation-issue-pages/enforcement-detainers (last visited Mar. 31, 2013) (summarizing litigation in various states).

369 *See generally* ROSENBLUM & KANDEL, *supra* note 68, at 38–40 (discussing changes announced by ICE to respond to concerns raised about the section 287(g) and Secure Communities programs).

370 *See supra* text accompanying notes 349–352.

371 *See* Cuéllar, *supra* note 343, at 32–33, 41–47, 52–78 (arguing that immigration enforcement provisions tend to be particularly susceptible to entrenchment); McLeod, *supra* note 329, at 154–55, 173–74 (arguing that undoing the entrenched criminal-immigration convergence would necessitate a complete conceptual reorientation of immigration law).

immigration enforcement, generates convictions not reliably predicated on fault. The overlap of the systems corrodes the integrity of each. Meaningful reforms by state or federal actors—and perhaps at both levels—must account for these underappreciated consequences of current deportation policy.