1-1-2017

Proportionality Lost? The Rise of Enforcement-Based Equity in the Deportation System and Its Limitations

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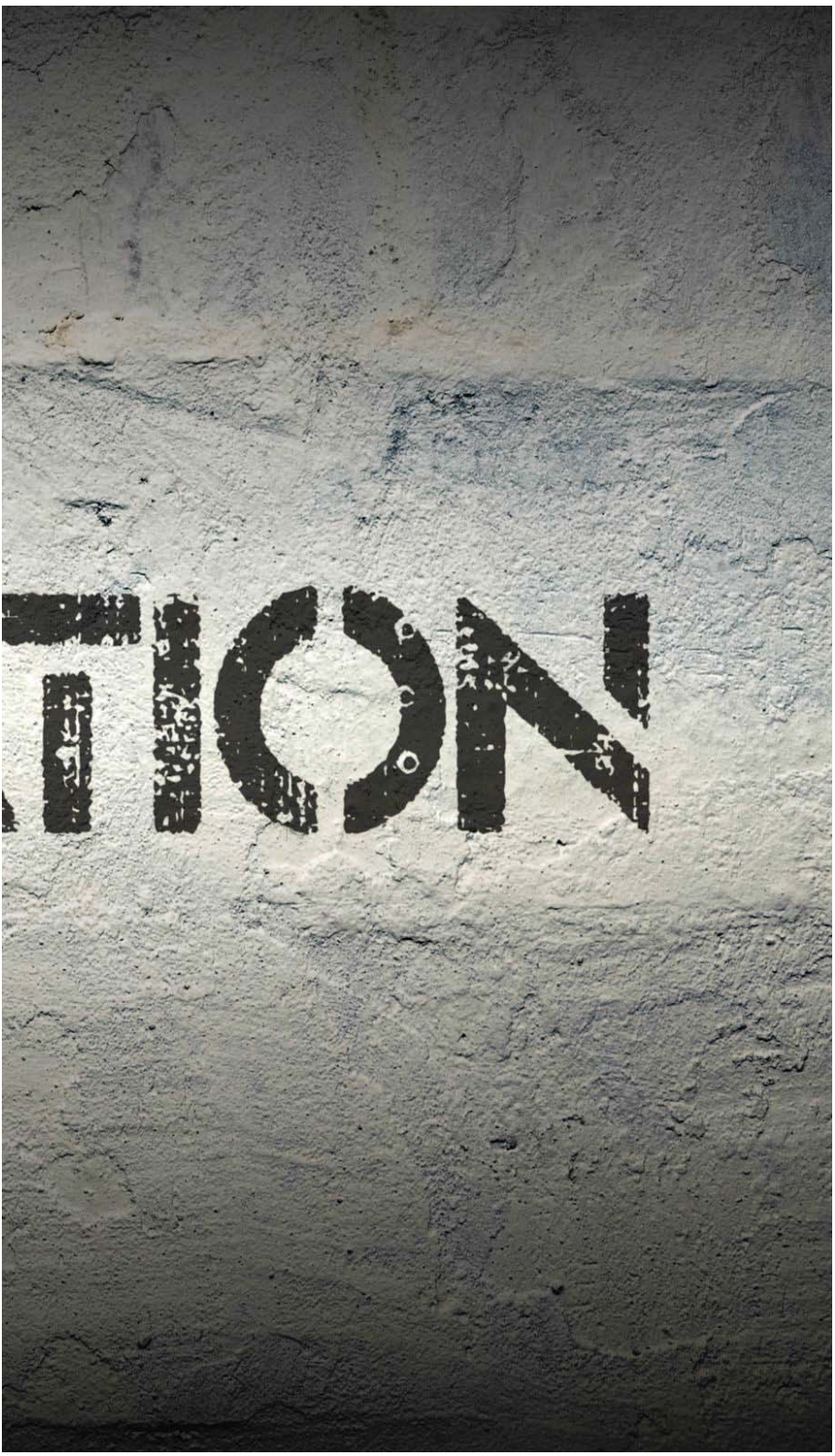

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The Rise of Enforcement-Based Equity in the Deportation System and its Limitations

BY PROF. JASON A. CADE

Moones Mellouli lawfully entered the United States in 2004 on a student visa. He earned undergraduate and graduate degrees with distinction, taught mathematics at the University of Missouri-Columbia, became a lawful permanent resident (LPR) and got engaged to a U.S. citizen. In 2010, Mellouli pleaded guilty to possession of a sock as drug paraphernalia in Kansas state court, a misdemeanor offense. After he successfully completed probation in 2012, the federal immigration enforcement agency put him in deportation proceedings pursuant to a statutory ground of removal targeting controlled substance offenses. Ineligible for discretionary adjudicative relief under current law, Mellouli was deported. When his appeal finally reached the Supreme Court in 2015, the justices reversed.[1]

The government's deportation of Mellouli for possession of a sock, and the Court's subsequent reversal of the agency, reflect the remarkable transformation of immigration law that has occurred in the United States over the last two decades. This article discusses the shift

from a deportation system that previously allowed for more formal adjudicative-discretion to one in which state and federal enforcement officials bear primary responsibility for assessing proportionality and fairness through discretionary enforcement decisions regarding both lawfully and unlawfully present noncitizens. That shift, toward what I call enforcement-based equity, has exerted increasing influence on executive branch actions in immigration law as well as the U.S. Supreme Court's recent immigration jurisprudence.[2]

A Brief Primer on Deportation Law

In general, deportation rules target two groups of noncitizens. One consists of persons who are deportable on the basis of being present in the United States without authorization. Another consists of lawfully present noncitizens who become deportable after being convicted of certain offenses or engaging in other prohibited behavior (e.g., unauthorized employment or unlawful voting). A deportation order signifies the formal ejection of a noncitizen falling into one of these groups from the United States. Generally speaking, it is a civil legal determination, following an administrative proceeding, that the noncitizen does not have a right to remain in the country.

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For much of immigration law's history, immigration judges presiding over deportation proceedings were statutorily empowered to weigh a noncitizen's positive and negative factors before entering an order of removal.[3] Where, on balance, deportation would be overly harsh in light of mitigating factors, immigration judges often had the equitable discretion to suspend or set it aside. Criminal law judges, too, had the authority to issue a sentencing "recommendation," considered binding on federal authorities, that deportation not follow from a criminal conviction in light of the defendant's individualized circumstances.[4] Moreover, for most of the 20th century criminal history did not play a major role in determining the deportability of noncitizens. Congress enacted the first criminal removal ground in 1917, for persons convicted of a "crime involving moral turpitude," but this applied only within the first five years of the noncitizen's entry and only if a prison sentence of at least one year was imposed.[5] Over the years, Congress gradually expanded the criminal offenses that would lead to deportation, but removal on the basis of criminal history remained relatively rare—about 7 percent of all deportations.[6]

In the late 20th century, however, Congress enacted a series of laws that precipitated a dramatic shift in immigration law.[7] Extensive revisions to the immigration code made all unauthorized presence a deportable offense (though not a criminal infraction) and also significantly multiplied and broadened the categories of criminal offenses triggering deportation for lawful present noncitizens.[8] Simultaneously, Congress drastically reduced the statutory authority for immigration law judges and criminal sentencing judges to make equitable determinations about the appropriateness of deportation in individual cases. A few discretionary forms of relief remain, but they are exceedingly difficult to qualify for.[9] As a result, many criminal offenses that are treated quite lightly under state penal laws—for example, petty shoplift-

ing, turnstile jumping and minor marijuana possession offenses—now can trigger detention, deportation, and lengthy or permanent bars on lawful return, with little room for immigration judges to balance equitable factors, even for long-term LPRs.[10] In fact, under current law even convictions that have been fully pardoned, expunged or entered but deferred pending completion of diversionary programs in many cases can continue to result in immigration consequences.[11]

At the same time, the size of the population deportable on the basis of unlawful presence has grown to more than 11 million, two-thirds of whom apparently have lived in the United States for over a decade.[12] The reach of modern deportation law is thus vast, with many millions of foreign nationals in the United States potentially subject to enforcement actions despite longstanding community ties.

The Rise of Enforcement-Based Equity

Although immigration is a controversial and frequently divisive topic, most would agree that a deportation is a life-altering event. To be sure, the severity will depend on the particular situation of the affected individual, but, generally speaking, few civil penalties exceed the impact that banishment has for many noncitizens, as well as their families and communities. The removal of a noncitizen from the United States commonly results in lengthy or permanent separation from children and spouse, significant economic hardship and the possibility of harm in the country of return. In the Supreme Court's words, "deportation may result in the loss of all that makes life worth living."[13]

On the other hand, immigration rules are intended to further undoubtedly significant interests. Such goals include public safety and national security, economic productivity (including the labor needs of U.S. employers as well as the protection of U.S. citizens' and lawfully present immigrants' economic interests), the prioritization of particular family relationships and the capacity to extend humanitarian relief to refugees and others. Deportation controls are ostensibly intended to remove from American society those noncitizens who pose threats or shirk rules.

The central challenge of our deportation system is the balance of these competing concerns. On the one hand are a deportable noncitizen's positive equities and mitigating factors, including the strength of family and community ties, the length of residence in the United States, economic contributions, general moral character, hardship or danger faced in the country of return and so on. On the other hand are the noncitizen's transgressions, including the nature and recency of any criminal activity or the frequency and egregiousness of any immigration violations.

This concern, raised by any legal system that administers significant sanctions, reflects the principle of proportionality. Proportionality refers to the fit between the gravity of the underlying offenses, tempered by any mitigating or exacerbating factors, and the severity of the sanction.[14] To be sure, there is no universal agreement about the point at which a given penalty becomes disproportionate. Nevertheless, most lawyers, scholars and jurists accept that enforcers or enforcement systems should be sensitive to special cases and that at some point the gap between the consequences of deportation for an affected individual and the nature of the underlying violations becomes too wide, raising proportionality problems.

As discussed above, in the 1990s Congress dramatically widened the net of deportability while constraining back-end, formal adjudicative discretion. Nevertheless, removing equitable discretionary authority from the purview of judges does not necessarily excise all consideration of fairness from the deportation system. Instead, Congress's expansion of deportability grounds and contraction of back-end adjudicative equity may simply have shifted power (and, some might argue, responsibility) to police, prosecutors and federal enforcers to evaluate proportionality concerns at the front-end stages of the process.

This phenomenon has long been recognized in the criminal law field, where one consequence of enacting broad, inflexible penal statutes and mandatory sentencing guidelines is to transfer equitable power to law enforcement police and prosecutors, who act as the criminal system's normative gatekeepers.[15] Legislators have incentives to increase the severity of penal laws, relying on police and prosecutors to exercise discretion in determining who to arrest and prosecute, so that criminal law is appropriately and proportionally applied to individual human beings. Discretion is thus critical to temper and refine broad criminal statutes.

Similarly, in the immigration context, Congress's expansion of the grounds for removal, in conjunction with the narrowing of adjudicative discretionary authority, effectively (if not intentionally) transferred substantial gate-keeping power to the deportation system's enforcement officials. Notably, when media accounts began highlighting stories of the immigration agency's indiscriminate enforcement against long-time lawful permanent residents of the harsher statutory provisions enacted in 1996, many of the same legislators who had voted for the revisions wrote a letter to the attorney general urging more systematic prosecutorial discretion in order to avoid "unfair" deportations and "unjustifiable hardship."[16]

Modern immigration law delegates wide authority to the Department of Homeland Security (DHS) to determine enforcement priorities.[17] The vast number of potential enforcement targets is also relevant. Even as laws and attitudes about undocumented workers and immigration enforcement have become more stringent, Congress's budgetary appropriations in recent years to the Executive's immigration agencies permit the removal of only a small fraction of the total number of noncitizens who may be deportable on the basis of unlawful presence, criminal history or other infractions.[18] Thus, even as the Obama Administration actualized more than 2.5 million removals—far more than any other administration in history[19]—these were a drop in the bucket relative to the size of the pool. This massive underfunding, coupled with the breadth of modern deportation categories and the constriction of back-end discretion, suggests that Congress depends on the Executive to set priorities and exercise

discretion when determining which percentage of the total removable population to target. President Trump has indicated a desire to increase deportations and detention above Obama's numbers, and it remains to be seen whether Congress will significantly increase the appropriations necessary to do so.

Recent Efforts at Enforcement-Based Equity in the Executive Branch

Under President Obama, DHS endeavored to implement enforcement-based equity in specific ways. I will highlight two such efforts here. First, the Department of Homeland Security prioritized enforcement against recent border-crossers and noncitizens who encounter criminal justice systems. Although not all deportations of persons within these categories will be proportional, prioritizing limited resources in this way does lessen the likelihood of enforcement against non-targeted groups, whom the government may believe are likely to present more significant equitable claims. Noncitizens who have already been living in the United States for some time, and who have avoided contact with the criminal justice system, are more likely to have developed ties and relationships that might militate against removal.

As a result of this strategy, border removals under the Obama Administration dramatically increased as a percentage of overall removals—something on the order of 66 percent in recent years.[20] Similarly, nearly half of recent deportees had at least some kind of criminal history.[21] As discussed below, the Supreme Court appears to believe, as do many scholars and advocates, that the executive branch's approach to the removal of noncitizens with criminal history has been overly coarse. And by and large, the vast majority of those whom DHS terms "criminal aliens" have been convicted only of traffic offenses, low-level drug possession or crimes of migration (illegal entry or re-entry). Nevertheless, the Obama Administration's focus on noncitizens who encounter the criminal justice system—which the Trump Administration has indicated it will continue to pursue—does increase the likelihood that those put in removal proceedings will have negative factors justifying deportation.

Second, DHS in recent years has increased the use of prosecutorial discretion in immigration enforcement, on both a case-by-case level and more categorically. In 2011, John Morton, then-director of Immigration and Customs Enforcement (ICE), began the roll-out of a series of agency initiatives aimed at encouraging more systematic use of prosecutorial discretion. Through memoranda and trainings, agency leaders set out various positive and negative factors to be balanced in the exercise of discretion. Over time the agency tinkered with the criteria and priorities, but the consistent focus was on encouraging front-line operatives to target noncitizens with criminal history or significant immigration violations, and to consider forbearance in cases with compelling humanitarian factors.

These prosecutorial discretion initiatives met with significant resistance by front-line operatives. In fact, one of ICE's unions sued the agency, and refused to allow its 7,700 members to engage in agency training on the use of prosecutorial discretion. ICE's prosecutors—the trial attorneys who represent the government in deportation proceedings—did not engage in organized resistance, and over time many increased their use of equitable discretion. But the results of these efforts nationwide varied wildly, with a small handful of immigration court jurisdictions representing the majority of discretionary case closures.[22] Many similarly situated jurisdictions saw dramatically different closure rates.[23]

Deferred Action for Childhood Arrivals (DACA), announced in 2012, represented the agency's attempt to shift toward more systematic and categorical implementation of enforcement discretion. DACA focuses on one of the most sympathetic groups of undocumented noncitizens—longtime residents who were brought to the United States at a young age, demonstrate potential for economic productivity and lack indicia of dangerousness or wrong-doing. Such individuals have been acculturated as Americans and have little or no culpability in their immigration violations, thus bringing the current system's potential for disproportionality into sharp relief. Instead of the reactive, case-by-case approach of the earlier prosecutorial discretion initiatives, DACA encourages those individuals who can meet the specified criteria to announce themselves to the agency for consideration for "deferred action," which amounts to a revocable assurance that the individual will not be a priority for removal for a period of time.[24]

It is some indication of the highly sympathetic circumstances of DACA-eligible noncitizens that the Trump Administration has decided not to end the program, instead allowing recipients to retain deferred action until their grant periods expire. In other respects, the new administration is likely to change the enforcement approach. In particular, DHS Secretary John Kelly has issued new memoranda that largely abandon the Obama-era prosecutorial discretion guidelines as agency-wide policy. Consequently, the exercise of discretion in individual cases currently is in a phase of uncertainty and change.

Enforcement-Based Equity in the Supreme Court

In recent years, the Supreme Court has come to grips with this new reality of enforcement-based equity in the deportation system. In fact, concerns about the system's potential for disproportionality appear to have influenced much of the Court's recent jurisprudence in this area, although the Court likely is far from recognizing a substantive proportionality principle. Here I will highlight a few of the leading cases that appear to be animated by the Court's equity concerns about the operation of the current removal and enforcement scheme.

Arizona v. *United States*

On June 22, 2012, the Supreme Court decided *Arizona v. United States*, which clarified the federal government's primacy in the area of immigration enforcement, although preserving some room for state activity.[25] The Court struck down on preemption grounds most of the chal-

lenged provisions of Arizona's omnibus law, SB 1070, which essentially had created a state-level branch of the federal immigration enforcement system. For present purposes, most remarkable about Justice Kennedy's majority opinion is its direct acknowledgement that equity in the deportation scheme today depends almost entirely on the exercise of prosecutorial discretion.

Justice Kennedy first explained that a "*principle feature* of the removal system is the *broad discretion* exercised by immigration officials."[26] It is worthwhile to appreciate the clarity of the Court's understanding—and endorsement—of the connection between federal agencies' exercise of prosecutorial discretion and the implementation of equity in the deportation system:

> *Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all. . . .* Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service . . . . *Returning an alien to his own country may be deemed inappropriate even where he has committed a removable offense or fails to meet the criteria for admission.*[27]

The Court in *Arizona* thus acknowledged that not all noncitizens made deportable by Congress are similarly situated, and that, as a result, executive enforcement officials should weigh individual equities in determining the appropriateness of removal in particular cases. This stark endorsement of the central role of enforcement discretion in the modern deportation scheme—including discretion not to pursue persons who are formally removable—set the stage for the Court's preemption analysis of the challenged provisions of SB 1070. Throughout its discussion, the Court's analysis reflected its concern that the challenged statutory provisions would enable state or local authorities to negate the federal government's determination not to penalize certain removable individuals, whether resulting from case-by-case evaluation or macro-enforcement priorities.[28]

Padilla v. Kentucky

As described above, the Obama administration's immigration enforcement agency largely declined to differentiate among so-called "criminal aliens," treating almost any kind of criminal history as an irrefutable signifier of undesirability. All indications are that the Trump administration will take an even more expansive approach. Recent rulings, however, suggest that overly aggressive enforcement of the Immigration and Nationality Act's (INA) criminal law provisions troubles the Court.

The justices' discomfort with the inflexible operation and harsh consequences of current deportation rules was perhaps most apparent in its 2010 decision in *Padilla v. Kentucky*, which took the unusual step of regulating an aspect of the removal system through a constitutional criminal procedure ruling.[29] Relying on erroneous advice from his attorney, Jose Padilla (a long-time lawful permanent resident) pled guilty to a criminal charge that all but guaranteed his deportation. The Court's watershed holding in that case—that the Sixth Amendment requires criminal defense counsel to render effective advice about the potential immigration consequences of a conviction—was firmly rooted in the new realities of federal immigration law, including the evisceration of opportunities for leniency in the face of criminal convictions.

The Court noted that for much of the 20th century the grounds of criminal removal were narrow, and zeroed in on the fact that "immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation."[30] Justice Stevens' majority opinion emphasized the more recent loss of mitigating mechanisms at both federal and state levels, which he described as "critically important . . . to minimize the risk of *unjust* deportation."[31] As a result, "the drastic measure of deportation . . . is now virtually inevitable for a vast number of noncitizens convicted of crimes."[32]

It would be constitutionally unfair, the Court reasoned, to allow persons to plead guilty without being aware that the penalty of deportation would follow. Rooted in the Sixth Amendment's command that criminal defendants be afforded adequate assistance of counsel, the decision puts constitutional obligations only on criminal defense attorneys. Practically, however, the ruling will pressure prosecutors and judges to ensure that defense attorneys have adequately advised their clients so that convictions cannot later be undone on ineffective assistance grounds. Recognizing that equitable discretion in the removal system has shifted to earlier, enforcement stages, Justice Stevens also expressed the hope that the Court's Sixth Amendment ruling would encourage defense attorneys and prosecutors to take immigration consequences into account when engaging in plea bargaining.[33]

The Categorical Approach Cases

Padilla established a structure for noncitizen defendants to reach plea deals that avoid deportation, or that preserve narrow possibilities for equitable discretionary relief in later deportation proceedings. Another set of cases decided over the last decade have worked toward the same objective by narrowing the range of criminal convictions that trigger mandatory removal. For the most part, these decisions have concerned noncitizens with minor drug-related convictions that, while given lenient treatment under state law, were charged as "aggravated felony" deportation grounds by ICE prosecutors—a categorization that would foreclose any possibility of discretionary relief.[34] The name is something of a misnomer, as many convictions falling within this category are neither aggravated nor felonies.[35] The Court has rejected many of the governments' overzealous efforts by requiring a categorical match between the elements of the criminal offense and the removal ground.[36] Through these rulings, the Court has reigned in the harshest interpretations of the criminal removal provisions and safeguarded at least limited op-

portunities for equitable decision-making in deportation proceedings.

In *Carachuri-Rosendo v. Holder*, for example, the government argued that Carachuri-Rosendo's two minor state-law drug possession crimes would have made him a felony recidivist drug offender under the Controlled Substances Act, had he been federally prosecuted, therefore constituting an aggravated felony.[37] The Court focused on the need to preserve prosecutorial discretion in the conviction-to-removal pipeline. Federal procedure allows prosecutors to choose, in the exercise of discretion, whether to seek a recidivist enhancement. Many state codes afford state prosecutors similar discretion. The Court found that allowing immigration judges to apply their own recidivist enhancements "would denigrate the independent judgment of state prosecutors."[38] In Carachuri-Rosendo's own criminal case, the prosecutor chose to abandon the recidivist enhancement. One can only speculate on the prosecutor's motives for doing so, but the Court's ruling ensured that such measures by government attorneys will limit the impact of the conviction in subsequent immigration proceedings.

The Court employed a similar approach in *Moncrieffe v. Holder*.[39] Adrian Moncrieffe, a long-time lawful permanent resident with two U.S. citizen children, was stopped for a driving offense in Georgia and arrested for possessing a small amount of marijuana. He pleaded guilty as a first-time offender to possession of marijuana with intent to distribute. ICE asserted that Moncreiffe's conviction triggered the "illicit trafficking" aggravated felony ground of removal, which categorization would take equitable discretion away from the immigration judge.[40]

In a 7 to 2 decision, the Court rejected the government's position, creating space for a discretionary judgment by an immigration judge about the justifiability of Moncrieffe's deportation. The Court again emphasized the categorical analysis that should be employed to determine the immigration consequences of criminal convictions. A "state offense is a categorical match with a generic federal offense only if a conviction of the state offense necessarily involved . . . facts equating to the generic federal offense."[41] The noncitizen's actual conduct, the Court explained, is not relevant to the categorical approach. Instead, courts "must presume that the conviction rested upon nothing more than the least of the acts criminalized, and then determine whether even those acts are encompassed by the generic federal offense."[42] If the state statute criminalizes conduct that is broader than the generic federal offense referenced in the Immigration and Nationality Act, there is an insufficient match between the offenses to warrant imposition of the relevant removal ground.

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The state conviction at issue in *Moncrieffe* was an insufficient match with the aggravated felony drug trafficking category because the cross-referenced federal statute captured both felonious sale and misdemeanor distribution (defined as social sharing of a small amount of marijuana for no remuneration). Although the government argued that the federal scheme treated misdemeanor distribution as a sentencing exception, the Court still found the approach excessive. Some state-law marijuana distribution convictions would unambiguously correspond only with federal misdemeanors, involving just a small amount of marijuana and no remuneration.

The underlying problem was that lawfully present noncitizens whose conduct was not egregious would find themselves subject to a mandatory removal category

without any possibility of equitable balancing. The Court concluded its opinion in *Moncrieffe* by chiding the government for its unduly aggressive approach to the criminal deportation provisions, especially with respect to the removal of LPRs with minor criminal history:

> This is the third time in seven years that we have considered whether the Government has properly characterized a low-level drug offense as "illicit trafficking in a controlled substance," and thus an "aggravated felony." Once again we hold that the Government's approach defies "the commonsense conception" of these terms.[43]

In *Mellouli*, mentioned at the outset of this article, the Court similarly rejected the government's scorched-earth approach to seeking the deportation of LPRs with minor drug crimes. Following an arrest for driving offenses, Moones Mellouli was detained. After officers discovered four Adderall pills in his sock, the state charged him with trafficking contraband in jail. A deal was later struck, and the amended complaint to which Mellouli pleaded guilty charged only the lesser offense of possessing drug paraphernalia—a sock—and did not identify the substance that the officers had seized.[44]

In another 7-2 decision, authored by Justice Ginsburg, the Court held that Mellouli's drug paraphernalia conviction was not a removable offense. First, the Court noted that federal law does not criminalize simple possession of drug paraphernalia. In addition, federal law defines drug paraphernalia, for purposes of nonpossessory crimes such as production or trafficking, as "any 'equipment, product, or material' which is 'primarily *intended or designed for use*' in connection with various drug-related activities," in contrast to "common household or ready-to-wear items like socks."[45] Justice Ginsburg also observed that in 19 states Mellouli's conduct would not even have been deemed a criminal offense.

Immigration officials' theory for Mellouli's deportability was that "a paraphernalia conviction 'relates to' any and all controlled substances, whether or not federally listed, with which the paraphernalia can be used."[46] The Court, however, again underscored the necessity of a categorical approach to analyzing the immigration consequences of criminal convictions, emphasizing that the INA's controlled-substance ground of removal applies only to noncitizens actually convicted of laws relating to the federally controlled substances that are listed in section 802 of Title 21.[47] In particular, the Court was troubled by the "anomalous result" that minor paraphernalia offenses could trigger removal more easily than offenses based on the actual possession or distribution of drugs, since those offenses support removal only if they necessarily involve a federally controlled substance.[48]

Thus, the Court again insisted on a "categorical approach" when considering the immigration consequences of criminal convictions, finding an insufficient match between the state conviction and the federal removal category in Mellouli's case.

Notably, Justice Ginsburg's opinion for the majority endorsed the fact that as a consequence of the categorical approach, noncitizens in criminal proceedings might "enter 'safe harbor' guilty pleas" that avoid immigration sanctions.[49] Indeed, Mellouli's own plea seemed to have been an instance of this, in light of the deal struck and the amended complaint's omission of the nature of the discovered pills in Mellouli's sock. As it had done in *Padilla*, then, the Court in *Mellouli* endorsed the appropriateness of plea-bargain deals that help noncitizens avoid removal when significant equities support their continued residence in the United States.[50]

Mellouli and the Court's other recent crime-based-deportation rulings aim to inject considerations of individual fairness into the deportation process. *Padilla* pushes defense attorneys to seek safe harbors for their noncitizen clients, and prosecutors to weigh immigration-law consequences in exercising their discretion to strike individualized plea deals. At the same time, decisions like *Carachuri-Rosendo*, *Moncrieffe* and *Mellouli* help preserve the effectiveness of such criminal court deals in downstream removal proceedings, where back-end balancing is much constrained.

The Limitations and Drawbacks of Enforcement-Based Equity

To be sure, a deportation system that relies primarily on enforcement discretion for proportionality and fairness is far from ideal. One drawback of relying on enforcement discretion to keep the deportation system normatively justifiable is that executive actions in this area tend to arouse significant ire and controversy. States, congresspersons or members of the public may not approve of the particular manner in which the DHS manages discretionary enforcement power, and may attempt to force modifications through legislation or litigation. We saw this dynamic at work in the criticism of, and challenges to, President Obama's deferred action initiatives. While the Court's recognition in *Arizona* of the necessity of prosecutorial discretion as a vehicle for equity in immigration enforcement provides some support for categorical initiatives like DACA, the nature and scale of such programs complicates questions about their validity or desirability.

Another limitation is that the implementation of equity through enforcement discretion often does little more than preserve the status quo. Deferred action and other forms of prosecutorial discretion typically do not resolve the underlying issue that triggered the initiation of removal proceedings. An undocumented youth who receives a reprieve under DACA, for example, remains without legal status and in legal limbo.

Finally, under any administration, the enforcement agency is unlikely to engage in much equitable balancing for noncitizens with almost any criminal history. The immigration enforcement arms of the federal government have consistently pushed for the broadest and most severe interpretations of the criminal removal statutes possible. The Trump Administration has broadened its conception of targeted "criminal aliens" to include even those who are arrested but not yet convicted.[51] Even President Obama's DACA program was foreclosed to anyone with a "significant misdemeanor," regardless of other equities or mitigating factors.[52]

There are obvious political reasons for these kinds of enforcement choices.

Prioritizing noncitizens who have had run-ins with law enforcement is seen as an efficient means of sorting a very large pool of potential enforcement targets and plays well with most constituents. Moreover, criminal history provides the government with information reasonably assumed to be relevant to a noncitizen's fitness to be a member of U.S. society, such as respect for law, dangerousness and economic productivity.[53]

But not all noncitizens with convictions, let alone arrests, are similarly situated. The deportation of noncitizens with criminal history will in many cases seem reasonable to most, but in many other situations it will be unjustifiably harsh in light of the relatively minor nature of their conduct and individual mitigating factors like rehabilitation, length of time in the United States, community and family ties, age and health concerns. At the center of every deportation case, there is an individual who often has formed deep community bonds of family, faith, employment and friendship. And where this is true, deportation results in life-altering consequences, both for that individual and for the family members, persons and institutions at the other end of those connections.

The theme of much of the Supreme Court's recent deportation jurisprudence is that even in a system of expansive deportation categories and constricted discretionary relief, the equities and impact of removal in the individual case must be considered in some way, even in cases involving noncitizens with convictions. But the Court is not institutionally well-positioned to make a big enough difference. It is unlikely, in the near future anyway, to recognize any substantive proportionality right (whether in the immigration context or elsewhere). The Court's decisions mainly enable the possibility of normative balancing. Thus, this jurisprudence, although important, is perhaps best seen as a signal to the political branches that aspects of the deportation system are in significant need of reform.

The most direct possibilities for redress of the current system lie with Congress. If federal lawmakers were to roll back the breadth and severity of the removal grounds, and restore mechanisms for adjudicative relief from removal for both lawfully present and undocumented noncitizens, the pressure on the Executive to adopt measures that ensure individual deportations remain proportional and justified would decrease. Until then, we can expect the Court to keep a steady diet of deportation cases on its docket, chipping away at the harshest edges of a system marked by insufficient formal opportunities for equitable balancing. ●

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Endnotes

1. 135 S. Ct. 1980 (2015).
2. I have explored this material in more depth in a series of recent articles. *See generally* Jason A. Cade, *Enforcing Immigration Equity*, 84 Fordham L. Rev. 661 (2015); Jason A. Cade, *Judging Immigration Equity: Deportation and Proportionality in the Supreme Court*, 50 U.C. Davis L. Rev. 1029 (2017).
3. *See* Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 212(c), 66 Stat. 163, 187 (formerly codified as amended at 8 U.S.C. § 1182(c) (1994)), *repealed by* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, div. C, § 304(b), 110 Stat. 3009-546, 3009-597 (1996); Immigration and Nationality Act of 1952, § 244, 66 Stat. 163, 214 (formerly codified as amended at 8 U.S.C. § 1254 (1994)), *repealed by* IIRIRA, div. C, § 308(b), 110 Stat. 3009-546, 3009-615.
4. *See generally* Jason A. Cade, *Return of the JRAD*, 90 N.Y.U. L. Rev. Online 36 (2015), http://www.nyulawreview.org/sites/default/files/NYULawReviewOnline-90-Cade.pdf.
5. Act of Feb. 5, 1917, Pub. L. No. 64-301, §§ 3 & 19, 39 Stat. 874, 875, 889.
6. Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 Wash. & Lee L. Rev. 469, 488 n.92 (2007).
7. In particular, see Anti-terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 18, 28, and 49 U.S.C.), and Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (1996) (codified as amended in scattered section of 8 U.S.C.).
8. *See, e.g.*, 8 U.S.C. § 1182(a)(6)(A)(i) (2012); 8 U.S.C. § 1227(a)(1)(B) (2012); 8 U.S.C. § 1227(a)(2) (2012).
9. *See, e.g.*, 8 U.S.C. § 1229b(a)–(b) (2012) (cancellation of removal for LPRs and non-LPRs); 8 U.S.C. § 1158 (2012) (asylum).
10. *See, e.g.*, Lopez-Valencia v. Lynch, 798 F.3d 863, 869 (9th Cir. 2015) (concerning the appeal of 42-year-old LPR in the country for 40 years who was deported as an "aggravated felon" after shoplifting $2 can of beer).
11. Jason A. Cade, *Deporting the Pardoned*, 46 U.C. Davis L. Rev. 355, 368–69 (2012).
12. Jeffrey S. Passel & D'Vera Cohn, *Unauthorized Immigrant Population Stable for Half a Decade*, Pew Res. Ctr. (Sept. 21, 2016), http://www.pewresearch.org/fact-tank/2016/09/21/unauthorized-immigrant-population-stable-for-half-a-decade.
13. Bridges v. Wixon, 326 U.S. 135, 147 (1945) (internal quotation marks omitted).
14. *See generally* Austin Lovegrove, *Proportionality Theory, Personal Mitigation, and the People's Sense of Justice*, 69 Cambridge L.J. 321, 330 (2010) ("[The severity of the punishment should be proportionate to the seriousness of the offence in question; but it also should be appropriate, having regard to the offender's personal mitigation."); Michael J. Wishnie, *Immigration Law and the Proportionality Requirement*, 2 U.C. Irvine L. Rev. 415, 416 (2012) ("Proportionality is the notion that the severity of a sanction should not be excessive in relation to the gravity of an offense.").

15. *See, e.g.*, Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 Yale L.J. 1420 (2008); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505 (2001).
16. Letter from 28 members of the U.S. House of Representatives to Janet Reno, Att'y Gen., U.S. Dep't of Justice, and to Doris M. Meissner, Comm'r, U.S. Immigration and Naturalization Servs. (Nov. 4, 1999).
17. *See* 6 U.S.C. § 202(5) (2012) (charging the Secretary of Homeland Security with "[e]stablishing national immigration enforcement policies and priorities"); 8 U.S.C. § 1103(a) (2012) (conferring broad power to the Secretary of Homeland Security over "the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens").
18. Moreover, Congress's immigration enforcement appropriation acts explicitly acknowledge—in fact, *provide*—that the Department of Homeland Security prioritize among noncitizens deportable on the basis of criminal history. *See, e.g.*, Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, 128 Stat. 5, 251 (2014); Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, Pub. L. No. 110-329, 122 Stat. 3574, 3659 (2009).
19. Serena Marshall, *Obama Has Deported More People than Any Other President*, ABC News (Aug. 29, 2016, 2:05 PM), http://abcnews.go.com/Politics/obamas-deportation-policy-numbers/story?id=41715661.
20. *See FY 2015 ICE Immigration Removals*, U.S. Immigration & Customs Enforcement, https://www.ice.gov/removal-statistics/2015 (last visited Mar. 10, 2017) (showing that border deportations constituted at least two thirds of all removal orders from 2012 to 2015).
21. *Id.* (showing that over half of deported persons in each year since 2010 had some kind of criminal conviction).
22. *See* Jason A. Cade, *The Challenge of Seeing Justice Done in Removal Proceedings*, 89 Tul. L. Rev. 1, 31–34 (2014).
23. *Id.* at 32 (showing large differences in discretionary case closures between smaller courts (e.g., Charlotte, Seattle, Phoenix and Omaha), mid-sized courts (e.g., San Diego, Atlanta and Dallas), and large courts (e.g., New York City and Los Angeles)).
24. In late 2014, Homeland Secretary Jeh Johnson announced an expansion of DACA and the creation of Deferred Action for Parents of Americans (DAPA). DAPA would have operated in a similar fashion to DACA, extending temporary reprieves from removal for otherwise law-abiding parents of children with United States citizenship or permanent residence. In 2015, these expansions were preliminarily enjoined by a federal judge in Brownsville, Texas. The government's appeal failed to convince a divided panel of the Fifth Circuit Court of Appeals, and on review the Supreme Court deadlocked 4-4, still down a member following the passing of Justice Scalia. *See Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff'd*, 136 S. Ct. 2271 (2016).
25. 132 S. Ct. 2492 (2012).
26. *Id.* at 2499 (emphasis added).
27. *Id.*
28. *See* Jason A. Cade, *Judging Immigration Equity: Deportation and Proportionality in the Supreme Court*, 50 U.C. Davis L. Rev. 1029, 1043–46 (2017).
29. 559 U.S. 356 (2010). The rarity of a constitutional holding in this area is underscored by the fact that even the Court's substantive *criminal law* decisions are usually decided through subconstitional means. *See* Kate Stith-Cabranes, *Criminal Law and the Supreme Court: An Essay on the Jurisprudence of Byron White*, 74 U. Colo. L. Rev. 1523, 1548 (2003).
30. *Padilla*, 559 S. Ct. at 360.
31. *Id.* at 361, 368 (emphasis added).
32. *Id.* at 360.
33. *Id.* at 373.
34. Aggravated felonies make noncitizens subject to mandatory detention, ineligible for discretionary relief from deportation, and permanently prohibited from lawful return to the United States. *See* 8 U.S.C. § 1182(a)(9)(A)(ii) (2012) (aggravated felony bar to lawful admission to the United States); 8 U.S.C. § 1158 (b)(2)(B)(i) (2012) (aggravated felony bar to asylum and withholding of removal); 8 U.S.C. § 1229b(a)(3) (2012) (aggravated felony bar to cancellation of removal for LPRs); 8 U.S.C. § 1229b(b)(1)(C) (2012) (aggravated felony bar to cancellation of removal for non-LPRs).
35. *See* Jason A. Cade, *The Plea Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 Cardozo L. Rev. 1751, 1758–59 (2013) (providing examples).
36. The two notable exceptions from the Court's strict categorical approach, *Nijhawan v. Holder*, 557 U.S. 29 (2009), and *Torres v. Lynch*, 136 S. Ct. 1619 (2016), are the product of uniquely drafted deportation provisions and are also grounded in the Court's proportionality concerns. *See* Jason A. Cade, *Judging Immigration Equity: Deportation and Proportionality in the Supreme Court*, 50 U.C. Davis L. Rev. 1029, 1069–71 (2017).
37. 560 U.S. 563, 575–79 (2010).
38. *Id.* at 579–80.
39. 133 S. Ct. 1678 (2013).
40. *Id.* at 1683.
41. *Id.* at 1684 (internal quotation marks and alteration marks omitted).
42. *Id.*
43. *Id.* at 1693 (quoting Carachuri-Rosendo v. Holder, 560 U.S. 563, 573 (2010)).
44. Mellouli v. Lynch, 135 S. Ct. 1980, 1983 (2015).
45. *Id.* at 1985.
46. *Id.* at 1988 (quoting Matter of Martinez Espinoza, 25 I. & N. Dec. 118, 120 (BIA 2009)).
47. *See id.* at 1989.
48. *Id.*
49. *Id.* at 1987.
50. *See also* Vartelas v. Holder, 132 S. Ct. 1479, 1492 n.10 (2012) (endorsing the idea that lawful permanent residents might "negotiate a plea to a nonexcludable offense," allowing them to travel outside the U.S. without triggering immigration problems).
51. Memorandum from John Kelly, Sec'y, U.S. Dep't of Homeland Sec., Enforcement of the Immigrant Laws to Serve the National Interest (Feb. 20, 2017), https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf.
52. *See generally* Jayesh Rathod, *Crimmigration Creep: Reframing Executive Action on Immigration*, 55 Washburn L.J. 173 (2015).
53. *See* Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 Stan. L. Rev. 809, 826–27, 846 (2007).