



THE  
PROSECUTOR'S ROLE  
IN THE CURRENT  
IMMIGRATION  
LANDSCAPE

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**T**he United States Supreme Court has held that criminal defense counsel is constitutionally obligated to advise noncitizen defendants about the immigration consequences of guilty pleas and to defend against these consequences. (*Padilla v. Kentucky*, 559 U.S. 356 (2010).) But what is the role of the prosecutor when a noncitizen defendant faces the possibility of deportation? As criminal courts increasingly become the gateway to federal immigration enforcement, this question is particularly timely.

Entire communities are impacted when a noncitizen defendant is subject to deportation. Current immigration enforcement efforts are expanding, causing increased anxiety and mounting distrust of law enforcement within the immigration community. Moreover, noncitizens in the criminal justice system are now facing penalties that may not have been contemplated or considered in determining the appropriate consequences for the underlying criminal offense. Prosecutors need to be acutely aware of all of these issues and concerns.

This article seeks to present the various types of immigration penalties that flow from certain criminal convictions; explore the ways in which federal immigration policies and consequences raise community trust and safety concerns; and provide suggestions for prosecutors interested in engaging in this issue moving forward.

#### **HOW IMMIGRANTS AND THEIR FAMILIES ARE IMPACTED BY CRIMINAL CONVICTIONS**

Maria, a longtime lawful permanent resident, was convicted of growing a marijuana plant in her backyard. Born in Mexico, Maria had lived in the United States for over three decades, raising her US citizen children and grandchildren here. Maria suffered from arthritis and turned to the same remedy her mother and grandmother had used: she grew a single marijuana plant, soaked it in rubbing alcohol, and rubbed the alcohol tincture on her painful joints. This was Maria's first and only arrest. Her public defender obtained "a good deal" from a criminal perspective: no jail time and four months of house arrest. Unbeknownst to Maria, however, that plea was the functional equivalent of a life sentence of exile under immigration law—she had unknowingly signed her own mandatory deportation order. Considered an "aggravated felony" under immigration law, this singular conviction subjected Maria to automatic deportation, with no opportunity to present her case to a judge. She was faced with the likelihood that she might be separated from her family forever.

Abigail had lived in the United States since she was a young girl. She graduated from high school in California and married her high school sweetheart. They were young when they had their first child together and felt an increased financial burden when, less than two years later, they had their second child. Abigail had two shoplifting convictions in short succession: the first for stealing dog food and the second for stealing baby formula for her eight-month-old son. She pleaded quickly, hoping to complete her short four-day jail sentence and return home to care for her family. However, instead of being released from jail, she was surprised to find

herself transferred immediately to immigration custody where she discovered, for the first time, that her two convictions subjected her to mandatory deportation.

Richard left his home country of Jamaica when he was 12 years old. He came to join his parents in the United States as a lawful permanent resident. He loved this country and volunteered to serve in the US Army during the Vietnam War. Like many war veterans, it was difficult for him to reintegrate after he returned from his tour of duty. He was convicted of low-level drug possession with intent to distribute stemming from his narcotics addiction, and served 23 days in county jail. Richard eventually sobered up, got his life back on track, and decided to apply for US citizenship. Instead of receiving his citizenship, however, Richard was placed in deportation proceedings, facing deportation to a country he had not called home in over 50 years.

Maria, Abigail, and Richard were all clients of the Immigrant Legal Resource Center's Immigrant Post-Conviction Relief Project. For each of them, and countless other noncitizens, there are lasting immigration consequences of a criminal conviction: permanent separation from family, lifetime exclusion from the United States, and often denial of any opportunity to present their case before an immigration judge. These consequences are not "collateral," but rather are the direct, immediate, and *mandatory* consequences of their criminal convictions. As the US Supreme Court has recognized, deportation is a "severe penalty," and the immigration consequence of a conviction "is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants." (*Padilla*, 559 U.S. at 356 (footnote omitted).)

This country's immigration system is more focused than ever on swiftly deporting noncitizens who come into any contact with law enforcement. Within a week of his inauguration, President Trump announced that the focus of immigration enforcement would be expanded to include immigrants charged—even if not yet convicted—with any criminal offense. (Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Jan. 30, 2017).) Acting director of US Immigration and Customs Enforcement (ICE) Thomas Homan said, in a June 2017 congressional hearing: "If you're in this country illegally and you committed a crime by being in this country, you should be uncomfortable, you should look over your shoulder. You need to be worried. No population is off the table." (Jason Le Miere, *Immigrants Are Not "Criminals, Drug Dealers and Rapists," ICE Director Says, Contradicting Trump*, NEWSWEEK (June 28, 2017), <http://tinyurl.com/yb5c69tn>.)

Since the presidential election of 2016, the immigrant community, writ large, has been living in a state of anxiety and fear. (Hilary Andersson, *Living in Fear of President Trump's Deportation Drive*, BBC NEWS (July 17, 2017), <http://tinyurl.com/ybp65uga>.) During President Trump's first 100 days in office, ICE reported a 40 percent increase in arrests compared to the same period in 2016. (*ICE ERO Immigration Arrests Climb Nearly 40%*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, <http://tinyurl.com/ybz3wmho> (last updated Nov. 2, 2017).) Many of these arrests have taken place in the early morning, at homes, at courthouses, at schools, and in front of children

and other vulnerable witnesses. (Andrea Castillo, *Immigrant Arrested by ICE after Dropping Daughter off at School, Sending Shockwaves through Neighborhood*, L.A. TIMES, Mar. 3, 2017, <http://tinyurl.com/j26swx>; James Queally, *ICE Agents Make Arrests at Courthouses, Sparking Backlash from Attorneys and State Supreme Court*, L.A. TIMES, Mar. 16, 2017, <http://tinyurl.com/k2qq8hc>.)

Over the past decade, and in particular from 2008–2016, there were more people deported than in any other similar time period in our nation’s history. The three million people deported in the last eight years outpaced the total number of people deported from the United States between 1892 and 1997. (See *Growth in Deportations*, N.Y. TIMES, Feb. 22, 2013, <http://tinyurl.com/b35eeyb>.) The primary basis for deportations is the existence of certain criminal convictions. As such, the decisions being made by prosecutors are inextricably linked to immigration consequences.

Federal immigration law provides for a variety of penalties for noncitizens convicted of state and federal offenses, including: deportation; detention, often with no mechanism for release on bond; the inability to travel internationally; and preclusion from future immigration benefits such as lawful permanent residence (a “green card”) or citizenship. Many criminal offenses automatically trigger deportation as a “mandatory minimum” punishment. This means, for

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example, that individuals convicted of an offense defined under immigration law as an “aggravated felony,” which includes many low-level, nonviolent offenses, are precluded from having an immigration judge consider their individual circumstances, including: how long they have been in the country, the impact of deportation on their US-citizen family, service in the military, business ownership, and other community ties and contributions. Examples of offenses triggering mandatory deportation include: a shoplifting offense with a one-year suspended sentence; misdemeanor possession of marijuana with the intent to sell; and sale of counterfeit DVDs with a one-year suspended sentence.

Any noncitizen of the United States—including longtime US residents like Maria, Abigail, and Richard, and undocumented immigrants, including those who have US citizen spouses and children—may be subject to deportation because of a criminal conviction. This is true even for convictions that are decades old, for which the noncitizen was already punished under the criminal justice system, and for convictions that a judge has dismissed and that no longer exist on the noncitizen’s criminal record.

#### WHY IMMIGRATION CONSEQUENCES SHOULD MATTER TO STATE AND LOCAL PROSECUTORS

As courts become gateways to the deportation pipeline, all actors in the criminal justice system, including prosecutors, should be examining their practices and policies with respect to immigrants. Prosecutors are charged with serving the public and are expected to “act with integrity and balanced judgment to increase public safety . . . , protect the innocent and convict the guilty, consider the interests of victims and witnesses, and respect the constitutional and legal rights of . . . defendants.” (STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION Standard 3-1.2 (AM. BAR ASS’N, 4th ed. 2015).) With these broad goals in mind, prosecutors have a vital role to play in ensuring that expanding federal immigration enforcement does not undermine community trust, public safety, or the fair administration of justice.

Deportations have a destabilizing effect on the innocent family members left behind and can negatively impact public safety. A 2017 study found that more than eight million US citizens live with an undocumented family member, and the vast majority (nearly six million) of that population are children. (Silva Mathema, *Keeping Families Together: Why All Americans Should Care about What Happens to Unauthorized Immigrants*, CTR. FOR AM. PROGRESS (Mar. 16, 2017), <http://tinyurl.com/y9dttye8>.) When noncitizen parents are deported, many children are then raised by a single parent or relatives, or placed in the foster care system. In turn, these children are more likely to engage in behavior that is self-destructive, display persistent aggressive behavior, and demonstrate significantly increased risks of incarceration and illegal behavior. As such, what may initially appear to impact only a single defendant may actually exacerbate larger public safety concerns.

Moreover, with expanding federal immigration enforcement efforts and mounting fear within the immigrant community, distrust toward law enforcement is a growing concern.

This distrust can exacerbate fragile relationships between immigrants who encounter the justice system and the prosecutors who seek to protect them. Elected prosecutors are an integral part of allaying immigrant concerns, strengthening community trust, and ensuring that all members of the community feel protected and respected.

Prosecutors often face inherent challenges when trying to secure cooperation from crime victims and witnesses. These concerns are amplified with immigrants, and more specifically noncitizens, who may fear that turning to an agent of law enforcement may lead to apprehension by immigration authorities. (Kim Janssen, *Foxx Fears “Chilling Effect” of Trump Orders for Immigrants Who Are Victims of Crimes*, CHI. TRIB., Mar. 28, 2017, <http://tinyurl.com/yc8m6nam>.) As recent federal enforcement practices have intensified, immigrants are less likely to contact law enforcement after a crime occurs. (David S. Kirk et al., *The Paradox of Law Enforcement in Immigrant Communities: Does Tough Immigration Enforcement Undermine Public Safety?* (Columbia Law Sch. Pub. Law & Legal Theory, Working Paper No. 11-281, 2011).) Yet, as noted by King County (Seattle) prosecuting attorney Dan Satterberg, “[u]ndocumented immigrant victims . . . are particularly vulnerable to crime . . . [and] [v]iolent criminals are adept at preying on the most vulnerable and marginalized in our community.” (Dan Satterberg, *Crackdown on Immigrants Undermines Public Safety*, SEATTLE TIMES, Mar. 24, 2017, <http://tinyurl.com/ybexak5b>.) Despite efforts to protect immigrant crime victims through efforts such as U visas, recent immigration enforcement policies—such as courthouse arrests of testifying victims—may further deter crime victims from coming forward. (Marty Schladen, *Immigration Agents Detain Domestic-Abuse Victim in Court*, USA TODAY, Feb. 15, 2017, <http://tinyurl.com/yaqenbwj>); *Victims of Criminal Activity: U Nonimmigrant Status*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://tinyurl.com/hferp74> (last updated Aug. 25, 2017).)

## WHAT PROSECUTORS CAN DO

Prosecutors should prioritize strengthening community trust and ensuring that all members of the community feel safe engaging with local law enforcement. They can play—and in many counties have played—a key role in doing so with immigrant communities. Listed below are policies and practices that prosecutors can implement to address immigration issues and concerns.

**Establish the prosecutor’s office as a safe place for immigrant crime victims.** Prosecutors can promote their offices and courthouses as “safe places” for the immigrant community, and partner with community groups and other stakeholders to create alternate systems for crime reporting if immigrants victimized by crime are reluctant to engage law enforcement. San Francisco district attorney George Gascón recently implemented an “immigration escort policy” whereby advocates escort any fearful undocumented witnesses or victims through the courthouse, notify a supervisor, and call a local advocacy group to offer assistance if ICE arrives. (Heather Knight, *S.F.’s DA, Public Defender Mend Fences over Questioning of Immigrants*, S.F. CHRON., Sept. 2, 2017,

<http://tinyurl.com/yabjhnz5>.) Prosecutors can also support efforts to combat immigration attorney fraud by establishing hotlines and other mechanisms that provide defrauded immigrants with a place to turn. (Rachel Estabrook, *Boulder’s Strategies to Protect Immigrants from Fraud Could Go Statewide*, COLO. PUB. RADIO NEWS (July 18, 2017), <http://tinyurl.com/y98n5z62>.) Finally, elected prosecutors can use their leadership voice to push back on policies that entangle local law enforcement in immigration enforcement activities, thereby eroding community trust.

**Establish pre-arrest and pre-plea diversion programs for low-level offenses.** Prosecution of “quality-of-life” crimes exposes noncitizens to deportation for minor infractions such as urinating in public, driving without a license, failing to pay a public transportation fee, or possessing small quantities of marijuana. It is questionable whether any public safety benefits of prosecuting these quality-of-life crimes outweigh the disproportionate impacts on poor people, people of color, and noncitizens. (Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271 (2006); Derrick Z. Jackson, “Broken Windows,” *Broken Policy*, BOS. GLOBE, Dec. 29, 2014, <http://tinyurl.com/y7kk73pl>.) Some district attorneys are moving away from traditional prosecution of certain low-level offenses, and instead addressing these offenses through fines or civil citations. (Rudy Trevino, *New D.A. Announces Changes to Marijuana Enforcement*, KIII TV (Jan. 5, 2017), <http://tinyurl.com/ybbpwapl>.)

For crimes that are prosecuted, expanding access to pre-plea diversion programs can help mitigate against the “severe penalty” of deportation. Because many diversion programs require a guilty plea prior to participation, federal immigration policies can use these diverted convictions as grounds for deportation, despite a court’s subsequent dismissal. In contrast, pre-arrest and pre-plea diversion programs allow prosecutors to address the drivers of crime, such as substance use and mental health issues, thereby promoting public safety while also minimizing immigration consequences for noncitizens. These programs also allow noncitizen defendants access to important treatment services, which may be unavailable if they enter the justice system.

Some jurisdictions are reevaluating their policies, with this starting point of avoiding convictions in order to minimize the possibility of a deportation penalty in mind. In Cook County, Illinois, individuals with first-time and low-level offenses can participate in classes on substance abuse and “justice involvement” to avoid a conviction, and thus avoid deportation. (*State’s Attorney’s Drug School Diversion Program*, TREATMENT ALTERNATIVES FOR SAFE COMMUNITIES, <http://tinyurl.com/ycwmhhs7> (last visited Nov. 20, 2017).) A bill recently signed into law in California allows individuals charged with certain drug offenses to participate in a treatment program in lieu of entering a plea. (Assemb. Bill 208, 2017–2018 Reg. Sess. (Cal. 2017).)

Diversion programs—both pre-booking and pre-plea—can also minimize the amount of courthouse contacts and may increase participation by noncitizen defendants in treatment programs. In Seattle, for example, the Law Enforcement

Assisted Diversion (LEAD) program allows police officers to divert individuals directly to community-based programs.

**Consider in plea bargaining the immigration consequences of a conviction.** As explained above, many low-level, nonviolent offenses, such as drug possession, and even failing to pay a public transportation fee, can lead to mandatory deportation. (Max Rivlin-Nadler, *Yes, New Yorkers CAN Be Deported for Jumping a Turnstile*, VILLAGE VOICE (Feb. 27, 2017), <http://tinyurl.com/ybbuhh6>.) Thus, the decisions that prosecutors make during the charging and plea bargaining stages can result in overly harsh and unintended consequences for immigrant defendants and their families.

The Supreme Court of the United States has encouraged both the defense and the prosecution to consider immigration penalties in the plea bargaining process in order to “reach agreements that better satisfy the interests of both parties.” (*Padilla*, 559 U.S. at 373.) Defense counsel and prosecution were encouraged by the Court to work together “to plea bargain creatively . . . in order to craft a conviction and sentence that reduce the likelihood of deportation.” (*Id.*)

Prosecutors around the country are implementing this approach. Santa Clara County (California) district attorney Jeff Rosen instructed his staff to consider in plea discussions whether immigration consequences will be “disproportionally heavy” compared to the “actual sentence.” (Memorandum from Jeff Rosen, Dist. Attorney, Santa Clara Cty., to Fellow Prosecutors (Sept. 14, 2011), <http://tinyurl.com/yayk4upd>.) Brooklyn district attorney Eric Gonzalez similarly directed staff to consider immigration consequences and to offer, where possible, immigration-neutral dispositions that “neither jeopardize[] public safety nor lead[] to removal or to any other disproportionate collateral consequence.” (Press Release, Brooklyn Dist. Attorney’s Office, Acting Brooklyn District Attorney Eric Gonzalez Announces New Policy regarding Handling of Cases against Non-Citizen Defendants (Apr. 24, 2017), <http://tinyurl.com/y8dz2m8x>.) In Baltimore, state’s attorney Marilyn Mosby and her chief deputy recently instructed the office’s prosecutors “to ensure that there are only minor consequences for minor crimes” by “considering the unintended collateral consequences that our decisions have on our immigrant population.” (Press Release, Office of the State’s Attorney for Baltimore City, States Attorney Marilyn Mosby Instructs Her Office to Strongly Consider Prosecutorial Discretion for Cases Involving Immigrant Defendants, Witnesses, and Victims (May 4, 2017), <http://tinyurl.com/yanatg4b>.) California, in 2016, enacted a statewide law mandating prosecutors to “consider the avoidance of adverse immigration consequences in the plea negotiation process” for all cases. (Assemb. Bill 1343, 2015–2016 Reg. Sess. (Cal. 2015).)

Considering immigration consequences during plea bargaining does not necessarily mean forgoing a felony conviction, offering a light sentence, or giving special treatment to noncitizen defendants. In some instances, during the plea bargaining phase, a noncitizen defendant may need to “plead up” to avoid mandatory deportation. (*People v. Bautista*, 8 Cal. Rptr. 3d 862 (Ct. App. 2004).) This means that the prosecutor can offer a conviction to a more serious

offense that carries longer custody exposure or seek additional probation requirements. As the US Supreme Court recognized in the recent case of *Lee v. United States*, many noncitizen defendants are willing to do this if it means protecting their opportunity to remain in the United States. (137 S. Ct. 1958 (2017).) Prosecutors should continue to explore how best to advance public safety while also considering the impact of immigration consequences on the individual, as well as the broader community.

**Support postconviction relief opportunities.** Many noncitizens are not adequately advised of the immigration consequences of their guilty pleas and are subject to unanticipated mandatory deportation. Prosecutors should support efforts to enhance the criminal defense bar’s legal representation of immigrants and should streamline internal legal processes for handling requests to vacate convictions where the immigrant defendant was not aware of, or able to defend against, the immigration consequences of a conviction.

Forty-five states, including California, Massachusetts, and New York, have some form of postconviction procedure that allows defendants to have convictions vacated when they were not advised or defended against immigration consequences. (*See, e.g.*, CAL. PENAL CODE § 1473.7; MASS. R. CRIM. P. 30; N.Y. CRIM. PROC. LAW § 440.10.) Prosecutors can work with advocates to create streamlined and transparent postconviction practices by, for example, establishing an office point person who reviews motions and, when appropriate, agrees not to oppose them. Some prosecutors have also worked with community groups to run community record-clearing events to help vacate damaging convictions from the records of citizens and immigrants. This work acknowledges rehabilitation and the propriety of second chances.

## CONCLUSION

Prosecutors have an obligation to ensure fairness in the administration of the criminal justice process. (*Brady v. Maryland*, 373 U.S. 83 (1963).) As aptly noted by Justice Anthony Kennedy, “[a]s a profession, . . . [lawyers] should know what happens after the prisoner is taken away” to better understand the “hidden world of punishment.” (Anthony M. Kennedy, Assoc. Justice, Supreme Court of the United States, Address at the A.B.A. Annual Meeting (Aug. 9, 2003), <http://tinyurl.com/yakpjkt>.)

In today’s climate, the impact of a criminal conviction is no longer “hidden” from prosecutors or from immigrant communities. Prosecutors have an obligation and an opportunity to consider immigration consequences of convictions, charges, or even arrests for immigrant defendants because, as the Supreme Court has long recognized, lifelong banishment is among the harshest punishments imaginable. Being aware of, and adopting policies that take into account, the immigration consequences that are triggered by the criminal justice system is integral to the prosecutor’s duty to promote public safety as well as the interests of justice. ■