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Article

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

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ABSTRACT

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

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

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***3 INTRODUCTION**

Carlos[1] has a full life--he is a father to two young daughters, engaged to be married, and has worked as a driver for the same company for nearly a decade. He is a graduate of New York City's public school system, attending from elementary school through high school. He is a lawful permanent resident of the United States who left his native Dominican Republic at the age of three. He also, from time to time, has smoked marijuana. When I met Carlos he was facing misdemeanor charges of marijuana possession after getting arrested while walking his grandmother's dog and smoking a marijuana joint. He had one previous misdemeanor conviction for the same offense and no other criminal record. I served as the immigration attorney working on his case in consultation with his appointed criminal defense attorney.[2] As such, it was my job to inform Carlos that a conviction of the charges against him would leave him deportable, likely triggering removal proceedings a few years down the road, if not immediately.[3] No one had ever talked with him before about the immigration consequences of criminal convictions. He was confused and shocked and didn't understand how he could be forced to leave his lawful home and his daughters because of two marijuana joints.

Carlos's criminal defender and I reached out to the Assistant District Attorney (ADA) assigned to his case. She had already offered Carlos a plea deal--a guilty plea to misdemeanor marijuana possession with several days of jail time. We explained to her that this offer meant something very different for Carlos than for a United States citizen defendant; for Carlos, the true penalty would be not only a few days of jail but also banishment from the only home he'd ever known.[4] We proposed an alternative plea to a disorderly conduct violation with as much or more jail time as she originally sought.[5] ***4** The ADA said she understood, but she couldn't give Carlos what she saw as preferential treatment by giving him a plea offer she wouldn't give a citizen. I explained to the ADA that our proposed alternative plea did not give Carlos preferential treatment; on the contrary, it merely corrected for the disproportionate penalty he would suffer should he be convicted of a marijuana-related offense. Negotiations with the ADA dragged on for months. Carlos's defender and I appealed to her supervisor and had our own supervisor intervene to apply pressure. Carlos gathered letters of support from family and friends, including his daughters' mother and his boss. He told me he was unable to sleep at night for fear of what would happen to him and his family if the ADA would not offer a plea that would preserve his immigration status. Eventually, she did, and Carlos remains in the United States with his family today.[6]

I begin with Carlos's story because it illustrates the enormous influence that state prosecutors[7] in the United States wield when prosecuting noncitizen defendants.[8] Had the ADA assigned to Carlos's case ultimately refused to offer an immigration-neutral plea, Carlos would have either pled guilty to a deportable offense or gone to trial and, likely, lost. Immigration and Customs Enforcement (ICE) would then take him into custody directly from the New York City ***5** jail and place him in removal proceedings.[9] He would have been held in mandatory, no-bond immigration detention with no opportunity to ask a judge to consider his release.[10] ICE would likely have transferred him once or twice within its vast nationwide network of detention facilities, forcing him to defend against his deportation from a remote detention center far from his loved ones.[11] Eventually, after months in detention, he would have asked an immigration judge for ""cancellation of removal," a second chance at remaining in the United States.[12] The immigration judge might have granted him this chance but might just as easily have denied it.[13] Had he been denied, Carlos would have been deported to the Dominican Republic,[14] effectively barred from ever returning to his home and family.[15] His daughters would have been left without a father, and their mother left without the financial support Carlos regularly provided.

In this Article, I argue that the outcome in Carlos's case was the outcome that justice demanded. The course taken by the prosecutor--engaging with the deportation risks associated with her original plea offer and offering a reasonably ***6** commensurate alternative plea that preserved Carlos's immigration status--was the appropriate and ethical course for a prosecutor to take. I argue, further, that this outcome shouldn't have required such extraordinary efforts on the part of an unusually resourced defense team; prosecutors should engage in this type of creative bargaining--when appropriate--as a matter of course.

State prosecutors in the United States possess great power over the lives of the noncitizen defendants they prosecute and the lives of their loved ones.[16] This power--largely unexamined despite its evolution over decades--is the result of a confluence of trends involving immigration law, federal immigration enforcement, and the criminal justice system.[17] Today, noncitizens in criminal court on even the most minor criminal charges face a dizzying array of negative immigration penalties that may flow from their conviction, including deportation,[18] detention,[19] the inability to travel internationally,[20] and preclusion from future immigration benefits, such as adjustment to lawful permanent residence or naturalization.[21] Increasingly, unforgiving immigration laws enforced by a ***7** growing array of federal enforcement programs mean that almost any interaction with the criminal justice system carries a real risk of deportation for any noncitizen, even a longtime, lawful permanent resident like Carlos with entrenched family and community ties in the United States.[22]

This reality places unique ethical and professional demands on all players in the criminal justice system when noncitizens are in court. Recognizing this, the United States Supreme Court announced for the first time, in *Padilla v. Kentucky*, that immigration consequences of criminal convictions are not ""collateral" consequences but "penalties] ... intimately related to the criminal process."[23] The Court announced that criminal defense counsel is therefore constitutionally obligated to thoroughly and competently advise noncitizen defendants as to the deportation risks of guilty pleas.[24] Most pertinent to this Article, Justice Stevens spoke for the Court, noting that the interests of both the defense and the prosecution are served by the ""informed consideration" of immigration penalties during plea bargaining.[25]

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

Part I of this Article begins with an overview of the changes in law and policy that have brought immigration-related penalties directly into state criminal courts. It is in response to these changes in law and policy that the Supreme Court decided *Padilla*,[27] and I go on to consider that decision and what it means for all players in the criminal justice system. Since *Padilla*, practitioners and scholars alike have focused newfound attention on the responsibilities of the ***8** criminal defense attorney when representing noncitizen clients[28] and, to a lesser extent, on the role of the judge presiding over noncitizen defendants.[29] The role of the prosecutor, however, has been largely unaddressed in the literature and advocacy materials that have emerged since *Padilla*. Part I concludes by considering how prosecutors across the country are responding to *Padilla*--both at the macro level of office-wide policy pronouncements and at the micro level of individual trial-level prosecutors. The micro-level analysis is based on the results of a survey completed by trial-level prosecutors in the Kings County (Brooklyn), New York District Attorney's Office[30] as well as my own conversations with practitioners who provide technical support on issues of immigration law and policy to the defense and prosecution bars.[31]

In Part II, I consider the prosecutorial interests involved in the prosecution of noncitizen defendants in light of a matrix of measurable prosecutorial goals and objectives created in 2007 by the American Prosecutors Research Institute (APRI).[32] I propose that the informed consideration of immigration-related penalties during plea bargaining furthers prosecutorial goals, looking specifically to three broadly defined goals within the APRI matrix. First, I explore how the prosecution of noncitizens implicates the pursuit of fair, impartial, and expedient justice, including the integrity or finality of bargained-for convictions. Second, I examine how informed consideration of immigration penalties furthers the stewardship of public safety and the interests of the community in which the prosecutor practices. And third, I consider the prosecution of noncitizens ***9** in view of questions regarding the integrity of the prosecution profession, including practice within prevailing norms of professional ethics and the pursuit of the appropriate role of the state prosecutor in light of federalism concerns.

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

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

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

A. IMMIGRATION PENALTIES IN STATE CRIMINAL COURT

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

Just over fifteen years ago, Congress remade the immigration law in a manner so significant as to usher in a new era of immigration enforcement in the United States. Two laws enacted in 1996--the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant ***10** Responsibility Act (IIRIRA)--drastically expanded the categories of criminal conduct that trigger removal[34] and, just as drastically, reined in the categories of noncitizens eligible to seek relief from removal in immigration proceedings.[35] The net result is a federal immigration regime that requires deportation without the possibility of relief for many minor crimes.[36]

State criminal offenses that trigger mandatory deportation include, for example, a shoplifting offense with a one year suspended sentence;[37] misdemeanor possession of marijuana with the intent to sell;[38] or sale of counterfeit ***11** DVDs with a one year suspended sentence.[39] The nonmandatory criminal grounds of removal sweep even more broadly, and many noncitizens facing these grounds may still be ineligible for relief, depending on individual circumstances such as the duration of residence in the United States and the degree of hardship to lawfully present family members in the case of removal.[40] For example, a lawful permanent resident convicted of one petty theft offense with no jail time is not technically subject to the mandatory grounds of deportation[41] but is nonetheless likely to be ineligible for relief from removal if she had not lawfully resided in the United States for five years at the time of the criminal allegations.[42]

The intensity of the federal legislature's focus on creating and expanding crime-based grounds of removal is a relatively new phenomenon in U.S. history.[43] Leading up to the 1980s, the United States exercised its deportation power largely to remove those who violated the rules of entry and exit, not to wield a form of post-entry social control over immigrant populations.[44] But the transformation has been swift and complete, leading scholars to announce and assess the "criminalization of immigration law."[45]

The same national preoccupations that spurred these radical changes to the ***12** immigration laws have simultaneously led to ramped-up enforcement policies explicitly targeting noncitizens with criminal convictions.[46] These preoccupations are part of a national discourse that links immigration with increased crime rates and terrorist threats.[47] This linkage, however, is not borne out by the relevant statistical data. With regard to crime, studies consistently show that foreign-born immigrants to the United States have significantly lower rates of crime and incarceration than native-born citizens.[48] The statistical variance is so striking, in fact, that there is now a body of literature hypothesizing that increased immigration may be one significant contributing factor to decreased crime rates in the United States over the past two decades.[49] And the results of immigration enforcement efforts intended to target terrorist threats belie the credibility of attempts to link the two.[50]

Nonetheless, policy makers have responded to this public perception[51] by increasing the efficiency of deportation enforcement efforts with a sharp focus on those with current or previous involvement in the criminal justice system. While dramatically increasing the number of removals across the board,[52] the ***13** Department of Homeland Security, under President Barack Obama, has repeatedly announced its intention to focus on the removal of those with criminal convictions.[53] Over the course of the past two decades, from 1991 to 2010, the United States deported 1,309,173 people with criminal convictions.[54] This represents more than *sixteen times* the number of people deported on the basis of criminal convictions for the preceding *eighty years*.[55]

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

Figure 1. Figures taken from U.S. DEP'T OF HOMELAND SECURITY, 2010 YEARBOOK OF IMMIGRATION STATISTICS TBL.36 (2011); U.S. DEP'T OF HOMELAND SECURITY, 2004 YEARBOOK OF IMMIGRATION STATISTICS TBLS.45, 46 (2006); AND U.S. DEP'T OF JUSTICE, 2000 STATISTICAL YEARBOOK OF THE IMMIGRATION & NATURALIZATION SERVICE (2002)..

Although U.S. Immigration and Customs Enforcement (ICE) insists publicly that its enforcement resources are focused on "the worst offenders,"[56] the vast ***14** majority of individuals subject to detention and removal are minor offenders or those

with no criminal record whatsoever. In 2007, Human Rights Watch reported that 64.6% of those immigrants deported on the basis of a criminal conviction in 2005 were deported for nonviolent offenses.[57] ICE's own statistics reveal that its newest flagship enforcement program designed to target individuals with criminal convictions, Secure Communities, has failed in its stated mission. More than half of those removed under the program were convicted of misdemeanor offenses, including traffic violations, or had no criminal convictions whatsoever.[58]

Amidst public debate over the mass deportations of those with only minor offenses,[59] few voices have pointed to the problems inherent in any crime-based removal.[60] These problems include--as explored further below in section n.B--economic and societal harms faced by communities losing parents and breadwinners to deportation.[61] Additionally, imposing a second punishment of banishment upon those who have already served the sentence imposed on them by the criminal justice system raises questions of both fairness and proportionality, particularly when deportation follows relatively minor offenses.[62] Finally, foreign policy concerns are implicated by a system that essentially exports ***15** convicted offenders to less developed countries.[63]

As a result of the convergence of the legal and policy trends discussed here, the threat of a deportable conviction for a noncitizen, regardless of status, is far from idle. Whereas it may have been reasonable ten years ago for a long-time, lawful permanent resident with a few minor convictions on her record to assume she would slip through the cracks and avoid ICE detection, her chances of doing so today are slim.[64] Individuals with removable convictions are vulnerable to ICE detection upon any subsequent arrest, upon return to the United States from travel abroad, upon application for citizenship or other immigration benefits, and upon application for a renewal green card--which the law requires of lawful permanent residents every ten years.[65]

The real machinery behind what has been referred to as the new "enforcement on steroids"[66] is a group of rapidly expanding interior enforcement programs, denominated the ICE Agreements of Cooperation in Communities to Enhance Safety and Security (ACCESS) programs.[67] ACCESS is an umbrella program that includes a variety of enforcement operations, Secure Communities among them.[68] All of the ACCESS programs rely on cooperation by local law enforcement agencies to pursue their stated goals of identifying, detaining, and ***16** removing noncitizens with criminal convictions.[69] These programs receive thirty times the amount of federal funding today that they received only seven years ago--a total congressional appropriation of $690 million in 2011 as compared with $23 million in 2004.[70]

Once apprehended by ICE, noncitizens with removable convictions are rarely able to escape detention and, ultimately, removal.[71] Prosecutorial discretion is seldom exercised by immigration officers at the outset of a removal case, particularly for individuals with a criminal record.[72] Further, immigration judges are often legally precluded from exercising discretion over custody or removal determinations for those with criminal convictions.[73] The mandatory detention provision in section 236(c) of the Immigration and Nationality Act requires detention without the possibility of bond for noncitizens subject to the vast majority of the crime-based grounds of removal.[74] Asserting a claim for relief from removal in immigration court while held in ICE detention is extraordinarily difficult. ICE systematically transfers individuals to remote detention facilities far from family and evidence that might support a defense to removal.[75] Finally, there is no right to appointed counsel in immigration court.[76] Despite the fact that representation is one of the most significant indicators of success in removal proceedings, approximately sixty percent of detained immigrants ***17** and twenty-seven percent of nondetained immigrants go unrepresented in New York City.[77] Unrepresented respondents in immigration court--even those with colorable claims to relief from removal-- must navigate the "maze of hyper-technical statutes and regulations" that comprise modern immigration law, often without fluency in English.[78]

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

In 2010, the Supreme Court issued its landmark decision in *Padilla v. Kentucky*, acknowledging what immigrants and their advocates had long realized to be true: that the costs of deportation may be significantly higher for a noncitizen defendant than the costs of penal consequences such as jail time or probation.[79] This section first presents the Court's findings in *Padilla* and then addresses the impact the decision will have on all players in the criminal justice system, focusing in particular on prosecutors.

1. *Padilla*: Deportation as Penalty

Despite the obviously penal-like nature of deportation--banishing an individual from her home, family, and loved ones--it was long deemed a ""collateral consequence" of a criminal proceeding.[80] The import of this distinction is rooted in the "collateral consequences doctrine," which holds that a defendant must be fully advised of the direct--but not the collateral--consequences of her crime in order for a plea to be properly and voluntarily entered.[81] The long-held notion of deportation as a collateral consequence, however, was upended in March 2010 with the Supreme Court's pronouncement that deportation is a "penalty" in its own right.[82]

In *Padilla*, the Court held that deportation cannot be categorized either as a collateral or direct consequence of the criminal conviction to which it is tied.[83] Noting its own difficulty in "divorc[ing] the penalty from the conviction in the ***18** deportation context," the Court stated it was "confident that noncitizen defendants facing a risk of deportation for a particular offense find it even more difficult."[84] Identifying deportation as "intimately related to the criminal process," the *Padilla* Court further recognized a duty on the part of criminal defense attorneys to advise noncitizen clients regarding the deportation risks of a guilty plea.[85]

Before the Court in *Padilla* was Jose Padilla, a lawful permanent resident of the United States for more than forty years and a veteran of the Vietnam War.[86] Mr. Padilla was arrested on state drug-related charges and offered a deal by the prosecution that required a plea of guilty to the transportation of "a large amount of marijuana."[87] Advised by his lawyer that "he 'did not have to worry about immigration status since he had been in the country so long,"' he agreed and took the plea.[88] His conviction, of course, fell squarely within the controlled substance grounds of removability and triggered mandatory deportation.[89] The Court found that Mr. Padilla was entitled to correct advice from his criminal defense attorney regarding the deportation risks associated with his guilty plea by the Sixth Amendment.[90]

2. *Padilla's* Ripples Throughout the Criminal Justice System

The heart of *Padilla* is the obligation it places on criminal defense attorneys. There can be no substitute for competent and thorough advice communicated from a defense attorney to her client. But a full consideration of *Padilla* demands an exploration of the roles and responsibilities of each of the primary players in die criminal justice system--the criminal defense attorney, the prosecutor, and the judge--when noncitizen defendants face immigration penalties.[91] Two years after *Padilla*, the role of the prosecutor has been the least explored among these three players despite its centrality to a noncitizen defendant's ability to remain in the United States with her loved ones.

Following *Padilla*, there was (and continues to be) increased attention paid to the role of the criminal defense attorney when representing noncitizen clients. *Padilla* did not announce a new responsibility for criminal defense attorneys but ***19** rather found that the "weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation."[92] Nonetheless, criminal defense offices across the country, particularly indigent defense services, panicked at the prospect of incorporating a wide and complex new area of law into an already overburdened practice.[93] Many saw (and see) *Padilla's* requirements as an unfunded mandate that places an unreasonable burden on public defenders facing funding crises and overflowing dockets.[94] Despite these challenges, most commentators heralded the decision as a landmark for immigrants' rights, putting forward creative solutions to obstacles regarding implementation.[95]

Many commentators have turned to the nuts and bolts of implementing *Padilla* by considering best practices for bringing immigration expertise into public defense offices.[96] Innovative immigration services projects are emerging in public defender offices across the country.[97] At the same time, however, many areas of the country already suffering from crises in indigent defense remain light-years away from considering immigration consequences as a part of day-to-day criminal defense practice.[98] Across the board, it is clear that ***20** effective implementation will require a collaborative effort by the criminal defense bar and the immigration bar to make information and consultations on immigration consequences of criminal convictions more easily accessible.[99]

Padilla left some questions regarding the scope of the criminal defense attorney's duty unanswered, and scholars, practitioners, and lower courts have begun addressing these issues. Although a criminal defense attorney must, for example, advise a client regarding deportation consequences when those consequences are "succinct and straightforward,"[100] how broad is the duty to advise when the consequences are not as clear?[101] Is the criminal defense attorney's duty strictly limited to the deportation risks of a plea, or must she advise her client regarding the impact of the plea on eligibility to travel, to apply for citizenship, or to seek relief from removal in immigration court?[102] Immigrant advocacy groups, unpacking the professional standards cited by the *Padilla* Court, argue for a broad interpretation and suggest that criminal defense attorneys are duty

bound to inquire about a client's citizenship and immigration status at the initial interview and to investigate and advise about immigration consequences of plea and sentencing alternatives.[103] Courts will continue to explore these and other questions regarding the scope and depth of defense counsel's duties under *Padilla*.[104]

Padilla also raises questions regarding the role of the criminal judge presiding over a noncitizen defendant. Does the judge bear some responsibility for ensuring that the defendant is informed about the immigration consequences of ***21** a plea? If so, is it a proper function of the judge to provide this advice herself or to ensure that defense counsel has adequately done so? The decision itself does not speak to judicial obligations, but some scholars have argued that, because the decision brings immigration penalties within the ambit of the Sixth Amendment right to counsel, those penalties are now properly within a judge's purview when monitoring the propriety of a plea.[105]

Prior to *Padilla*, approximately half of the fifty states already had a statute on the books requiring judges to issue advisals regarding immigration consequences to noncitizen defendants entering a plea of guilty, and this number has subsequently increased.[106] Judicial inquiries into immigration consequences of a plea or into counsel's advice regarding immigration consequences demand scrutiny for various reasons. By engaging in inquiries into citizenship or immigration status, judges run the risk of compelling disclosure of privileged attorney-client communication or violating noncitizen defendants' Fifth Amendment right against self-incrimination.[107] Apart from these legal considerations, there is the practical consideration that a nervous defendant taking a plea in front of a criminal judge will rarely be able to meaningfully process the many formalized warnings included in the plea colloquy.[108] While these warnings may be administered in a way that is supportive of the spirit of *Padilla*, they are no replacement for meaningful advice by counsel.[109]

***22** A particular challenge for judges implementing *Padilla* arises in states that do not provide assigned counsel for defendants accused of minor crimes that do not carry a possibility of imprisonment. This practice, condoned by the Supreme Court in *Alabama v. Shelton*,[110] commonly results in noncitizen defendants pleading guilty to removable offenses, such as petty theft or drug possession, without any interaction with defense counsel.[111] Professor Alice Clapman has argued that this practice violates the spirit of *Padilla's* mandate that defendants not go uncounseled regarding deportation risks of pleas.[112] Judges may play a role in rectifying this problem by encouraging the appointment of counsel in all cases where immigration penalties may be present.[113]

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

> [I]nformed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties. As in this case, a criminal episode may provide the basis for multiple charges, of which only a subset mandate deportation following conviction. Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence. At the same time, the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does.[114]

A threshold question raised by this passage is what exactly "informed consideration" ***23** and "creative" plea bargaining on the part of the prosecution and the defense might look like. Justice Stevens notes that a well-crafted plea may avoid the defendant's future deportation, but, in practice, the defense and prosecution may work together to reach many other immigration-related goals as well, including: preserving the defendant's future ability to obtain immigration-related benefits, such as a green card or citizenship; preserving the defendant's eligibility to seek relief in immigration court if she already is deportable or will become so subsequent to the plea; preserving the defendant's ability to travel internationally without facing detention and removal proceedings upon return; and avoiding mandatory detention if the defendant anticipates being taken into ICE custody.

There are various ways in which the prosecution and defense may shape a plea agreement to achieve one or more of these immigration-related goals. First, the prosecutor may offer a plea under a different criminal statute of a similar nature and severity to the originally charged offense. A lawful permanent resident charged with misdemeanor intentional assault, for example, might be able to preserve her lawful immigration status by pleading guilty to misdemeanor simple assault, an offense of commensurate gravity to the charged offense but would not constitute a crime involving moral turpitude.[115] In some cases, the defendant may be unable to avoid removability and may seek simply to preserve her day in immigration court by crafting a plea that does not preclude eligibility for relief from removal. Although a guilty plea to almost any controlled substance offense, for example, will trigger the grounds of removability for a lawful permanent resident, many defendants may preserve eligibility for relief from removal by pleading guilty to an offense that does not include sale or intent to sell as an element.[116]

Second, the prosecutor may alter the sentencing component of the plea offer. A sentence of 364 days rather than 365 days on certain offenses, for example, will avoid triggering the aggravated felony grounds of removal.[117] Also related to sentencing, prosecutors may work with defense counsel to ensure that ***24** noncitizen defendants are able to access court-sponsored treatment programs. Noncitizen defendants are often precluded from participation in treatment programs either because of the presence of an immigration detainer[118] or because a guilty plea is required prior to participation, triggering irreversible deportation consequences.[119] Prosecutors may be able to facilitate a noncitizen defendant's access to court-sponsored treatment by joining defense counsel in requesting ICE to lift an immigration detainer[120] or consenting to diversion to treatment prior to the entry of a guilty plea.

Finally, the prosecutor may modify the language included in documents in the court file that pertain to the criminal charges, conviction, or sentencing, to protect the defendant should she one day face removal proceedings.[121] The language included in these documents is often highly relevant to subsequent determinations of removability because immigration judges are given significant leeway to look behind the statute of conviction when determining whether ***25** a conviction falls within certain criminal grounds of removability.[122] For example, when a noncitizen has been convicted of an offense involving fraud as an element, the immigration adjudicator may look to any relevant evidence to determine whether the alleged amount of loss to the victim exceeded $10,000, rendering it sufficient to trigger the fraud-related aggravated felony grounds of removal.[123] Modifying sentencing documents to reflect a loss to the victim of less than $10,000 might protect the noncitizen defendant from an aggravated felony charge in immigration court or provide her with a defense to such a charge.

The limited public discourse on this issue reveals that practitioners and scholars vary in the extent to which they approve of the notion of state prosecutors engaging with immigration issues during plea negotiations, despite Justice Stevens's overt endorsement.[124] One view, as expressed by Professor Stephanos Bibas and endorsed in this Article, is that the *Padilla* decision not only sanctions the prosecutor's engagement with these issues but encourages it.[125] Others have questioned the propriety of this engagement; Professor Daniel Kanstroom, for example, has applauded the Court for "bringing out into the open the *post-entry social control function* of deportation" but wonders whether it is appropriate for state prosecutors to "use deportation for leverage in criminal cases."[126]

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

Padilla has opened the door for prosecutors, like defense attorneys, to reevaluate the scope and nature of their role when prosecuting noncitizens. It is difficult to know the extent to which state prosecutors have begun to engage in this evaluative process, either at a policy level or at the level of individual practice. In this section, I begin by canvassing office-wide public policies issued by prosecutors. I then attempt to look behind these policy pronouncements to understand the attitudes and practices of "line prosecutors" who are litigating ***26** cases in criminal court on a day-to-day basis.

1. Office-Wide Policies

Public office-wide statements and policies on this issue are few and far between, even after *Padilla*. As far as I have been able to document, only one state prosecutor office nationwide--the Office of the District Attorney of Santa Clara County, California--has adopted a written policy that specifically addresses the consideration of immigration consequences during plea bargaining.[127] This policy cites *Padilla* to support "a dominant view ... that the appropriate consideration of collateral consequences[128] is central to the pursuit of justice."[129] The policy instructs Santa Clara County prosecutors that it is not only

appropriate but incumbent upon them to take "reasonable steps to mitigate ... collateral consequences" when those consequences "are significantly greater than the punishment for the crime itself."[130] Specifically with regard to immigration penalties, the policy urges prosecutors to consider alternative plea agreements that will avoid unjust outcomes, which are most likely to arise when the charged offense and corresponding sentence are less serious and disproportionate to the immigration risks.[131]

The Santa Clara policy was adopted by newly elected District Attorney, Jeffrey Rosen, after a bruising election campaign against the incumbent District Attorney, Dolores Carr.[132] During the campaign, it was revealed that Carr had personally arranged for a reduction in charges brought against an international student at Stanford University, whose attorney was a contributor to the Carr campaign to help avoid the student's deportation.[133] The arrangement flew in the face of public vows by Carr that her office would never alter pleas for immigration-related reasons.[134] Carr subsequently defended herself to the press, ***27** stating "[w]e strive for justice, and the result in this case was entirely just."[135] Once in office, Rosen realized it was time for a new policy and undertook a thorough evaluative process, engaging with community members and his own staff.[136] The resulting policy, at its core, normalizes the consideration of immigration penalties, granting line prosecutors the inherent authority to weigh immigration penalties during plea negotiations without requiring a deviation from normal policy or permission from above.[137] David Angel, Special Assistant District Attorney in Santa Clara and the principal drafter of the policy, reports that the new policy has yielded increased efficiency in case processing; with immigration penalties an open part of the plea discussion, a greater number of noncitizen defendants are settling their cases via an immigration-neutral guilty plea rather than taking the penal and immigration-related risks of going to trial on a case they would otherwise settle.[138]

Although Santa Clara's policy remains unique, the Immigrant Legal Resource Center (ILRC) has produced a model policy for offices considering adopting a policy similar in kind.[139] The model policy instructs prosecutors to "attempt, wherever possible and appropriate, to agree to immigration neutral pleas and sentences which do not have adverse immigration consequences."[140]

A handful of offices have responded to *Padilla* by creating a standard notification to be distributed to all defendants warning of the potential deportation risks of any conviction for any noncitizen defendant. This type of blanket notification is currently being used, for example, in New York City by the offices of the New York County District Attorney, the Queens County District Attorney, and the Office of the Special Narcotics Prosecutor.[141] Quite apart from the individualized approach embraced by the Santa Clara policy, these blanket prosecutorial notices may do more harm than good by attempting to simplify what is a varied and complex interaction between criminal state statutes ***28** and immigration penalties.[142]

2. Attitudes and Practices of Trial-Level Prosecutors

Regardless of larger policy determinations, individual trial-level prosecutors have wide discretion to make charging and plea decisions.[143] As a starting point for canvassing the views of these trial-level prosecutors, I partnered with the Kings County (Brooklyn), New York District Attorney's Office in distributing a survey entitled, "The Role of the Prosecutor: Immigration Consequences and Plea Bargaining."[144] The survey was distributed via an online link to trial-level prosecutors within the Kings County Office in January 2012 and consisted of ten questions regarding the role of the prosecutor with regard to immigration consequences during the plea-bargaining phase of a case. Of approximately 400 attorneys who received the survey and were actively prosecuting cases in criminal court, 185 responded.[145] Respondents to the Kings County survey have more opportunity than many to consider the issues raised by the survey questions, as the most recent census data indicates that 16.7% of all Brooklyn residents are noncitizens.[146]

The results of this survey are necessarily limited by its modest distribution, and Brooklyn respondents likely possess significantly more positive perceptions of immigrants than the country as a whole.[147] This is the case, first, because of basic demographics--Brooklyn is a heavily "blue" county that votes overwhelmingly democratic[148] and research shows this to be a reliable indicator of pro-immigrant views.[149] Furthermore, although the Kings County District Attorney's Office does not have a formal public policy on the question of immigration consequences, Kings County District Attorney Charles Hynes is widely ***29** recognized as one of the most progressive, elected prosecutors in the country,[150] and high-level officials in his office have gone on record in support of the consideration of immigration penalties during plea bargaining.[151]

Notably, the survey responses revealed attitudes toward the consideration of immigration penalties that were generally more positive than the respondents' reported corresponding practice. Just over half of respondents--fifty-three percent--agreed with the statement, "It is appropriate, in some circumstances, to alter a plea offer to mitigate negative immigration consequences."

Twenty-five percent disagreed or strongly disagreed.

Although more than half of respondents believe it appropriate to alter pleas in some circumstances, less than half actually translate this belief into practice with any frequency. When asked how often they alter a plea offer because of immigration consequences, a total of forty-six percent of respondents indicated they "rarely" or "never" do so. Forty-eight percent responded that they "sometimes" or "often" alter a plea offer for this purpose.

Respondents were also asked to consider a list of possible factors that might weigh in their decision whether to alter a plea to mitigate immigration penalties. Respondents, on average, identified factors that are directly connected to the criminal charges or the defendant's criminal record as weighing much more heavily than those factors relating to the defendant's immigration status and the hardship posed by immigration-related penalties. Respondents identified the defendant's criminal record and the severity of the charged offense as the two most relevant factors when determining whether to alter a plea, followed by the availability of an alternative plea to an offense of a similar nature or similar severity. Considerations pertaining to hardship to the defendant or her family should she face deportation followed significantly behind.

Respondents were given an opportunity at the end of the survey to provide any additional thoughts regarding "the proper role of the prosecutor during plea bargaining with regard to immigration consequences of charged offenses." By far, the most common theme among the responses to this open-ended question was the respondents' embrace of the pursuit of justice as the overarching ***30** prosecutorial goal. Indeed, twenty-one respondents mentioned the pursuit of "justice" or a "just" outcome in their answer to this question. Yet, not surprisingly, respondents differed in their perceptions of what constitutes justice. Twelve of the respondents who included an answer to this open-ended question expressed distaste for the consideration of immigration consequences during plea negotiations because it contradicted their perceptions of fairness and ***31** equity.[152] Another five voiced concern that decisions affecting immigration should be left entirely to the federal government.[153] Sixteen respondents described a perception of justice that focused on the protection of community, victim safety, or both.[154]

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

Figure 2.

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

Figure 3.

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

Figure 4. This figure represents the average response to the question, "What factors are most relevant when deciding to alter a plea offer because of immigration consequences?" Respondents were asked to rank each factor on a scale from "not relevant," represented on the vertical axis as 0, to "highly relevant," represented on the vertical axis as 3.

When asked to specify the source of their knowledge of the immigration consequences of the crimes they prosecute, respondents indicated a heavy ***32** reliance on their own research and previous work experience as opposed to more formal sources of training.[155] Presented with various possible sources of knowledge, twenty-eight respondents selected "other" and explained that their knowledge of these issues stems from informal experience and conversations on the job.[156] A relatively small number of respondents-- between ten and twenty-five percent--indicated that they rely on formal trainings or written or online materials provided by their own office or external agencies.

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

II. SERVING STATE INTERESTS THROUGH INFORMED CONSIDERATION OF IMMIGRATION

PENALTIES

In *Padilla*, Justice Stevens stated without much ado or discussion that the "informed consideration of possible deportation" during plea bargaining furthers the interests not only of defense counsel but of the prosecution.[157] This Part looks behind Justice Stevens's statement, examining informed consideration of immigration penalties in light of prosecutorial goals and interests.

Determining what constitutes the most fundamental of prosecutorial goals is not a simple task.[158] The role of the local prosecutor has changed drastically over the past century.[159] Changes include the vastly increased discretion now available to individual prosecutors at nearly every stage of a criminal case[160] as well as a movement by prosecuting offices toward greater openness within their communities, usually referred to as "community prosecution."[161]

Beginning in 2003, the APRI--the research and development arm of the National District Attorneys Association--undertook a five-year long "Prosecution Performance Measurement Project" in conjunction with a working group of ***33** prosecutors, scholars, researchers, and government officials in an effort to develop and implement a system of performance measures for prosecutors.[162] The working group began with the recognition that conviction rates, crime rates, and recidivism rates--the most commonly identified measures of prosecutorial success--insufficiently reflect the varied outcomes sought by the modern prosecutor.[163] As an alternative, the group sought to identify measurable outcomes that would accurately gauge prosecutors' successes in pursuing justice, defined to include "addressing a host of community desires and needs, decreasing citizen fear of crime, improving quality of life for community residents, and resolving problems by means other than just criminal prosecution."[164]

Ultimately, the group expressed the mission of the local prosecutor as follows: "Through leadership, the local prosecutor ensures that justice is done in a fair, effective, and efficient manner."[165] In parsing this mission, the group created a matrix (hereinafter the APRI matrix) that identifies the following three broad prosecutorial goals: 1) "to promote the fair, impartial, and expeditious pursuit of justice;" 2) "to ensure safer communities;" and 3) "to promote integrity in the prosecution profession and coordination in the criminal justice system."[166] Within the matrix, each of the three goals is broken down into several quantifiable outcomes and performance measures that are reflective of the broader goal.[167]

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

A. THE PURSUIT OF JUSTICE

The first goal identified in the APRI matrix is "to promote the fair, impartial, and expeditious pursuit of justice."[168] There are, of course, few notions as open to individual interpretation as the generalized pursuit of justice.[169] The wording of this first goal, however, suggests two different prisms through which to ***34** consider the prosecutorial pursuit of justice--first, the promotion of ideals of equity, such as fairness and impartiality, and second, the promotion of expedience. This section addresses each in turn.

1. Negotiating Fair and Proportionate Outcomes

Understanding how the prosecution of noncitizen defendants implicates fairness and impartiality is vital because prosecutors perceive the interplay quite differently. Many prosecutors believe it is unfair or unjust to extend a plea offer to a noncitizen defendant that is in any way modified from what she would extend to a citizen defendant.[170] Twelve respondents to the Kings County survey expressed the opinion, in response to an open-ended question about the role of the prosecutor, that it was unfair to offer a noncitizen a plea deal that differed in any way from what they would offer a similarly situated citizen; many of the respondents suggested this would be favoring noncitizens over citizens.[171] One experienced Brooklyn prosecutor, for example, stated: "My primary concern is to be fair while ensuring the public safety of my constituents. I try to be as consistent as possible in plea bargaining, and will not usually cut a similarly situated defendant a break just because he has immigration issues."[172]

But this perception of fairness is flawed in that it evaluates the equity of a plea based on the individual components of the deal instead of the totality of its outcome. First, in many cases the prosecution and the defense may be able to settle upon a

modified plea that is similar in nature and severity to the plea the prosecution would have sought in the absence of immigration penalties.[173] In ***35** circumstances where the only appropriate alternative offense is less severe than the originally charged offense, the defense and prosecution may agree upon a more severe sentence. As Carlos's story demonstrates, a noncitizen defendant is likely to be willing to serve more time in jail or perform more days of community service than she otherwise would have to avoid the risk of deportation. An alternative plea, therefore, is not necessarily a lesser plea.

Furthermore, in the vast majority of cases, a noncitizen defendant will be treated *more* harshly because of her immigration status if given the same treatment as a similarly situated citizen. Again, Carlos's story illustrates this reality. For a U.S. citizen defendant in Carlos's shoes, the plea originally offered by the prosecution would have resulted in several unpleasant days in jail before returning home to friends and family. For Carlos, however, it would have resulted in those same several unpleasant days followed by permanent banishment from the home he had known since the age of three and life-long separation from his two U.S. born daughters.[174] Furthermore, Carlos, like many deportees, would have faced mistreatment and stigmatization in his country of origin.[175] A prosecutor making the same offer to a noncitizen defendant that she would make to a citizen defendant in identical circumstances can take no comfort in the belief that she is offering equal treatment.

What true justice demands is an individualized consideration of the penalties that will flow from a noncitizen's plea and a measured response that ensures equity, not in the plea itself but in its outcome. This type of individualized consideration is necessary to achieve proportionality in the criminal justice system, a principle that underlies our common understandings of justice.[176] The ***36** former head of the National District Attorneys Association (NDAA), Robert Johnson, considers the quest for proportionality in plea outcomes to be a necessary part of the prosecutor's duty to pursue justice.[177] During his time at the helm of the NDAA, he called upon prosecutors to consider all consequences flowing from a conviction, stating:

> At times, the collateral consequences of a conviction are so severe that we are unable to deliver a proportionate penalty in the criminal justice system without disproportionate collateral consequences .... As a prosecutor, you must comprehend this full range of consequences that flow from a crucial conviction. If not, we will suffer the disrespect and lose the confidence of the very society we seek to protect.[178]

Mr. Johnson's proposal is by no means revolutionary. In fact, prosecutors regularly consider nonpenal consequences of convictions during plea bargaining--ranging from the defendant's eligibility for public housing to voting rights to licensing restrictions.[179] Myriad examples demonstrate just how commonly prosecutors exercise their discretion through charging or plea decisions to avoid collateral consequences of convictions with the purpose of achieving just and proportionate outcomes.[180] One respondent to the Kings County survey noted the regularity with which he and his colleagues consider nonpenal consequences of offenses, noting that "deportation has to be conssidered [sic] by the prosecutor as any other collateral consequence would be considered e.g., violation of parole or probation, revocation of a driver's license, etc."[181] Studies show that prosecutors working in jurisdictions with repeat-serious-offender laws (often referred to as "three-strikes" laws) are almost twice as likely to exercise their discretion to charge three-strikes arrestees with lesser offenses man they would otherwise have charged so as to avoid triggering mandatory minimum sentences.[182] And the Los Angeles County District Attorney's Office acknowledged nearly ten years ago that it is appropriate for prosecutors to offer alternative case settlements "[w]hen collateral consequences will have so great an adverse impact on a defendant that the resulting 'punishment' will be disproportionate to the punishment other defendants would receive for the same crime."[183]

***37** Furthermore, prosecutors and defense attorneys engaging in plea negotiations regularly trade in procedural mechanisms that were created principally to protect defendants from so-called collateral consequences. Intermittent sentencing, for example, is a sentencing posture allowed in many states that permits defendants to serve their sentence of incarceration only on certain days of the week, such as weekends, so as to avoid loss of employment.[184] In New York State, intermittent sentencing has been permitted since 1970[185] and was created to allow "petty offenders to remain in the community during working hours" such that "penal sanctions in such cases no longer would be responsible for unwanted harmful side effects."[186] It is regularly used as a chip during plea negotiations.[187] Another often bargained-for disposition that was created to mitigate negative collateral consequences of a conviction is the plea of nolo contendere, or "no contest," which protects the defendant against the conviction being used in a subsequent civil or criminal case.[188] More than sixty years ago, the Georgia courts acknowledged the plea of nolo contendere as an appropriate remedy for the disparate impact a conviction might have on different individuals, including the inability to hold public office, vote, or serve on juries.[189]

As these many examples show, the use of alternative pleas to mitigate the negative collateral consequences of a criminal conviction is neither new nor particularly controversial. And in *Padilla*, the Supreme Court elevated immigration penalties

above these collateral consequences, identifying them as "penalties" that are part and parcel of the criminal process.[190] Prosecutors willing to consider immigration penalties during plea negotiations and modify pleas accordingly are not favoring noncitizens over citizens, they are merely recognizing that the two groups of defendants are not similarly situated and acting accordingly. ***38** This recognition is not only in line with *Padilla's* findings, it is also fundamental to the pursuit of proportionate and fair outcomes. As one respondent to the Kings County survey stated, "As with all pleas that have potential collateral consequences, the prosecutor has to determine if the promised sentence, along with the likely collateral consequence, is proportional to the offense that the defendant is pleading to."[191]

2. Protecting the Finality of Bargained-For Pleas

The first goal in the APRI matrix also considers the value of expediency and efficiency within the prosecutor's pursuit of justice.[192] Although the finality of bargained-for pleas is not explicitly identified by APRI as an outcome associated with this goal, the Supreme Court has long noted that concerns regarding the protection of pleas from future collateral attack have "special force with respect to convictions based on guilty pleas."[193] This section will, therefore, focus on such concerns.

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

Collateral attacks brought under *Padilla* are subject to the ineffective assistance of counsel analysis laid out by the Court in *Strickland v. Washington:* first, the defendant must show that counsel's representation was ineffective in that it "fell below an objective standard of reasonableness," and, second, the defendant must show that this ineffectiveness prejudiced the outcome of the proceeding.[194] In the context of a *Padilla* claim, the first prong of ineffectiveness is met where defense counsel incorrectly advised or failed to advise the defendant regarding the deportation risks of a plea.[195]

To establish the second prong, or prejudice, in the context of a guilty plea, "a defendant must show the outcome of the plea process would have been different with competent advice."[196] In *Hill v. Lockhart*, the Supreme Court extended the *Strickland* analysis to plea bargains, finding prejudice where, "but for counsel's errors, [the defendant] would not have pleaded guilty and ***39** would have insisted on going to trial."[197] The Court has since expanded its understanding of prejudice during plea negotiations, making clear in the companion cases *Lafler v. Cooper* and *Missouri v. Frye* that "criminal defendants require effective counsel during plea negotiations" themselves.[198] Prejudice may be established, therefore, where a defendant rejected a formally offered plea because her attorney failed to present her with the offer[199] or misadvised her regarding the risks of proceeding to trial.[200] The Court has not explicitly reached the question of whether prejudice can also be established where counsel's ineffectiveness precluded the defendant from obtaining a hypothetical better plea bargain, but its Sixth Amendment jurisprudence may be moving in this direction.[201] In *Padilla*, Justice Stevens described the prejudice inquiry as follows: "[A] petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances."[202] This statement, particularly when viewed alongside *Lafler* and *Frye*, may reflect a broader understanding of the prejudice inquiry going forward--one that encompasses the multilayered decision-making process a defendant faces when considering a plea that will alter his life in myriad ways.[203]

Where a plea has been obtained after engaged and creative negotiations between the prosecution and the defense with regard to deportation risks, a defendant will be hard-pressed to establish prejudice even with clear evidence of ineffective assistance.[204] This may best be demonstrated through the following hypothetical:
***40** Christopher, a long-time lawful permanent resident with no prior arrests, is charged with attempted sale of a small amount of heroin. John, his defense attorney, begins engaging with Mary, the assigned assistant district attorney, to negotiate a plea. Mary is aware of Christopher's noncitizen status and aware of the mandatory deportation consequences of a plea to the attempted sale of a controlled substance. She is also aware, however, that while a plea to a possession-only drug offense would still trigger the grounds of removability for Christopher, it would likely preserve his ability to seek relief from removal in immigration court in the form of " "cancellation of removal."[205] Mary reaches out to John and offers Christopher a plea to a felony drug offense that does not require sale or intent to sell as an element but is the same level felony as the sale offense. In exchange, Mary seeks the same amount of jail time she would have asked for the sale offense, but with a longer period of postrelease supervision. Mary makes a note of the conversation and her reasoning in her file.[206]

John communicates this offer to Christopher, stating that he thinks it is a fair offer and, in any event, Christopher would

probably lose if he went to trial. Christopher asks him if the plea will get him in trouble with immigration, and John tells him that he's not an immigration attorney and he doesn't know. Christopher decides to accept the deal, pleads guilty, and serves about eight months in jail. At the end of his sentence, ICE picks Christopher up from the local jail and places him in removal proceedings. Christopher learns that he is eligible for cancellation of removal but fears his claim is weak.[207] He brings a claim based on *Padilla* to have his conviction vacated in state court.[208]

***41** The ineffective assistance of counsel Christopher has suffered in this case is clear: John failed to advise him of the clear deportation risk that accompanies any plea of guilty to a controlled substance offense.[209] In order to successfully obtain vacatur of his plea, however, Christopher must also demonstrate prejudice--that a rational person in his circumstances would have turned down Mary's proposed plea had he been correctly advised regarding the deportation risks.[210] Mary's actions in this case have made it unlikely that Christopher will succeed on his claim of prejudice. Christopher cannot argue that he would have gotten a "better bargain" to preserve his immigration status because the record demonstrates Mary already altered her offer to preserve Christopher's eligibility for cancellation of removal.[211] Further, a judge would be hard-pressed to find that a rational person in Christopher's shoes would have chosen to forego the plea--and the chance at obtaining cancellation of removal--in order to go to trial and risk *mandatory* deportation.[212] By engaging with the immigration penalties of the charged offense in this case, Mary has weakened Christopher's ability to bring a successful claim of prejudice on the basis of John's ineffective assistance.

In contrast to the informed and individualized consideration exemplified by Mary is the emerging trend, discussed above in section I.C.I, where prosecution offices create and distribute to all defendants a general warning regarding the deportation risks of criminal convictions. These policies have presumably been adopted in an effort to moot future claims brought under *Padilla*. Blanket prosecutorial advisals, however--like the judicial advisals discussed above in section I.B.2--simply cannot serve as a substitute for the competent and thorough advice of trusted counsel.[213] In fact, a generalized notice distributed by a ***42** prosecutor will be even less effective than a judicial advisal in ensuring that a defendant is truly making an informed plea because the defendant will rightly view the prosecutor as her adversary.

To the best of my knowledge, no court has yet considered how a prosecutorial notice of the risks of deportation might influence the *Strickland* analysis in the context of an ineffective assistance claim brought under *Padilla*. However, many courts have considered how judicial advisals affect such claims, and these decisions shed some light on how prosecutorial advisals might be viewed. Lower courts are divided as to how a judicial advisal given during plea allocution factors into the *Strickland* analysis in claims brought under *Padilla*. Some courts have found that a judge's admonition regarding the deportation risks of a plea does not cure counsel's misadvice regarding those risks or alleviate the ensuing prejudice.[214] We can assume that these courts would similarly find a prosecutorial advisal insufficient to correct for defense counsel's ineffectiveness under a *Padilla* claim.

Other courts have found that a warning issued by a judge can cure ineffective assistance of counsel; these decisions, however, focus primarily on the weight a judicial warning should be accorded due to the unique and impartial role that a judge plays.[215] In *Flores v. State*, for example, Mr. Flores sought to have his plea to misdemeanor possession of drug paraphernalia withdrawn after he was placed in removal proceedings.[216] Mr. Flores had been warned by the judge during his plea colloquy that his conviction might result in deportation, and he affirmed on the record that he understood this warning.[217] He nonetheless proceeded to enter his plea in reliance on incorrect advice by his attorney that a misdemeanor conviction would not trigger deportation.[218] The appellate court ***43** found that Mr. Flores's counsel's misadvice had not prejudiced the outcome of the proceeding because, "[a] defendant's sworn answers during a plea colloquy must mean something. A criminal defendant is bound by his sworn assertions and cannot rely on representations of counsel which are contrary to the advice given by the judge."[219]

I have highlighted the *Flores* decision because the Court's holding rested on a perception that judicial advisals carry certain indicia of credibility, rendering them trustworthy to the defendant. This perception may not be grounded in reality; as discussed above in section I.B.2, defendants are unlikely to absorb judge-issued warnings in a manner similar to advice they would receive from counsel. Nonetheless, these indicia are often perceived to be reliable and distinguish judicial advisals from prosecutorial warnings in the following ways. First, the judicial warning comes from a source the defendant is expected to trust, unlike a prosecutorial notice which comes from the defendant's adversary. Second, judicial advisals are traditionally given during the plea allocution and involve a back and forth between the judge and the defendant, confirming the defendant's understanding of the warning. Conversely, a prosecutorial notice merely handed to the defendant by the prosecutor does not provide the same type of confirmation. The characteristics of the judicial warning that give it perceived

legitimacy when considered as part of the prejudice inquiry are absent from the prosecutorial warning. It is unlikely, for this reason, that courts would find a blanket written notice by a prosecutor to moot subsequent claims of ineffective assistance of counsel raised by a defendant under *Padilla*.

B. ENSURING COMMUNITY SAFETY

The second goal in the APRI matrix is simply stated: "ensuring safer communities."[220] The prosecutor's responsibility as a steward of public safety is echoed in the various standards governing professional prosecutorial conduct, often described as primary to the responsibility to secure convictions in individual cases.[221] The APRI study group began its discussion of this goal by noting that "ensuring safer communities reaches beyond mere enforcement of laws."[222] When prosecuting noncitizens, the prosecutor must look beyond the individual crime she is prosecuting to envision the impact the immigration penalties of that crime will have not only for the accused, but for the accused's spouse, children, and for the larger community.

Vast numbers of individuals deported on the basis of a criminal conviction leave behind parents, spouses, and children who are U.S. citizens or lawful ***44** permanent residents of the United States.[223] Human Rights Watch estimates that ICE separated more than one million individuals from their spouses and children through crime-based deportation between the years 1997 and 2007.[224] As ICE escalates its enforcement operations that target people with criminal convictions,[225] we know that these numbers will only increase. In fact, if deportation rates continue at their current pace, ICE will deport more parents of U.S. children in 2011 and 2012 than it did in the preceding ten years.[226]

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

1. A Dangerous Cycle: Children Left Behind by Deportation

Ordered by Congress to begin tracking the deportation of parents whose children are citizens of the United States, ICE reported in early 2012 that, during the first half of fiscal year 2011, it removed 46,486 parents of at least one child that was a U.S. citizen.[227] This number constitutes twenty-two percent of ICE's total removals during that period.[228] In a recent study of eighty-five families affected by ICE enforcement actions, the Urban Institute found the ***45** most common change in family structure to be the conversion of a two-parent home to a single-parent home.[229] When a parent is deported, some children remain behind in the care of a second parent or in the care of another relative.[230] Some children, however, are left behind with no one to care for them and are forced into the foster system. At least 5,000 children are presently in foster care nationwide, subsequent to the deportation or detention of a parent by ICE.[231]

A child separated from one or both parents because of an immigration enforcement action is statistically- more likely to engage in behavior that is destructive both to herself and her community.[232] Of the children studied by the Urban Institute whose families had been affected by immigration detention or deportation, forty-one percent began displaying "[a]ngry or aggressive" behavior that was persistent over the long term.[233] These results are consistent with generalized studies of children brought up in single-parent or nonintact family homes, which show significantly increased risks of incarceration and illegal behavior, even when controlling for factors such as poverty and race.[234] Children in mother-only homes, for example, are twice as likely to face incarceration as children in homes with both parents present, controlling for common background and low income.[235]

***46** Not surprisingly, children left in the foster care system are at even greater risk of a wide host of negative outcomes that endanger public safety.[236] Perhaps of greatest concern for prosecutors is that children who spend a significant amount of time in the foster system prior to aging out are overwhelmingly more likely to become involved in the criminal justice system than their peers who were raised in intact homes.[237] In a 2010 study of young adults who had aged out of the foster system, for

example, eighty-one percent of the male respondents reported having been arrested, compared with a nationwide rate of only four percent.[238] Young adults who were raised in foster care also struggle with higher than average rates of unwanted pregnancies, unemployment, and educational deficits.[239]

Securing a deportable conviction for a noncitizen defendant, therefore, may leave that defendant's child or children at greater risk of future illegal behavior and involvement with the criminal justice system. This risk is even more significant among foreign-born communities, which have lower rates of crime and incarceration than native-born communities.[240] Crime-based deportations that separate children from their parents create risk in communities that, left alone, are statistically safer than the rest of the country.

2. Resource Drain: Increased Reliance on Public Benefits

Logic and anecdotal experience tell us that many of the men and women detained and deported by ICE are breadwinners, and the families these men and women leave behind face economic crises, often resulting in increased reliance on public benefits.[241] The Urban Institute's study confirmed this fact, reporting widespread economic distress among the families surveyed in the immediate and long-term aftermath of ICE enforcement actions.[242] Of the eighty-five families interviewed shortly following their loved one's apprehension by ICE, ***47** nearly two-thirds reported difficulty paying household bills.[243] Of eight families in the study who were homeowners prior to the enforcement action, four lost their homes.[244] More than half of the parents interviewed for the study reported that the food they could afford to buy their families did not last long enough, they could not afford to buy more food, or they could not afford to eat balanced meals.[245] Many parents reported eating less themselves so their children could eat more.[246]

The study attempted to discern ways in which families managed to get by despite these economic hardships. Many families received support, including a place to stay, from networks of family and friends.[247] For others, government assistance programs provided "crucial aid," including cash welfare (Temporary Assistance for Needy Families, or TANF); food stamps (the Supplemental Nutrition Assistance Program); Supplemental Nutrition Program for Women, Infants, and Children; and free or reduced-price school meals.[248] Reliance on TANF and food stamps was found among only one in ten of the families surveyed prior to the ICE enforcement action but jumped to one in seven in its aftermath.[249]

In cases where criminal allegations involve domestic abuse, the economic insecurity that follows the defendant's deportation is most often felt by the victim of the alleged crime. This stands at odds with the evolving view of the prosecutor not only as a steward of public safety, but as a protector of the rights of victims of crime.[250] Robert Johnson tells the story, for example, of a "highly respected district attorney in a major jurisdiction" who agonized over the outcome of a child abuse case where the complaining witness was a child and the defendant was the child's father.[251] The district attorney, Mr. Johnson explains, knew that "[t]his father, after all, would be deported upon conviction, destroying a family that the district attorney and the victim's family thought could be saved."[252] This district attorney's primary focus was not the hardship to the defendant but the unanswerable question of what would happen to the defendant's wife and child who, upon his deportation, would be left without a ***48** primary breadwinner.[253] Similarly, in another case, a woman complaining of domestic violence may want protection from her husband or partner's abuses, but she may not want him to be deported and therefore precluded from serving as a father to his children and providing much-needed child support.[254]

C. INTEGRITY IN THE PROSECUTION PROFESSION

The third and final objective in the APRI matrix is to "promote integrity in the prosecution profession," including the pursuit of "competent and professional behavior."[255] Like the pursuit of justice, the pursuit of integrity in any given profession is necessarily quite subjective. Nonetheless, one concrete way to gauge outcomes concerning professionalism is to turn to the standards of ethics governing that profession. This section begins with an analysis of prosecutorial standards of ethics and then turns to questions many prosecutors have raised regarding the propriety of prosecutors as state actors, considering federally imposed immigration penalties.

1. Prevailing Ethical Standards

Underlying all ethical standards governing prosecutorial conduct is the admonition that the prosecutor serve a role apart from that of mere advocate-- she must pursue not only convictions but the interests of society as a whole, and she must pursue

justice writ large.[256] The Model Rules of Professional Conduct, for example, devote an entire section to the "special responsibilities of a prosecutor," assigning the prosecutor "the responsibility of a minister of justice and not simply that of an advocate."[257] This ethical responsibility to justice and to society at large weighs particularly heavily in the context of plea bargaining, where the prosecutor wields immense power and discretion.[258] Pursuing a just plea bargain is necessarily different from pursuing a just trial outcome, where ***49** the focus is on the identification of guilt versus innocence.[259] The reality of the plea bargaining system is that defendants--even rational ones--choose whether to plead guilty on the basis of a range of considerations of which actual guilt is only one.[260] Standards of prosecutorial ethics recognize that to pursue a just plea outcome, the ethical prosecutor must consider the breadth of this range. The NDAA National Prosecutor Standards, for example, list twenty factors prosecutors "should consider" prior to finalizing a plea agreement.[261] Included in this list are many factors having nothing to do with guilt or innocence, such as any "[u]ndue hardship caused to the defendant" by the plea."[262] The indirect consequences of a plea, therefore, demand the attention of the ethical prosecutor because they weigh heavily in any logical assessment of the justice of a bargained-for outcome.[263]

And if this is the case, surely deportation risks demand heightened attention. *Padilla* acknowledged the gravity of immigration-related consequences of crimes, stating once and for all that they are not "collateral" but are a "particularly severe 'penalty' .... intimately related to the criminal process."[264] In August 2010, the Criminal Justice Section of the American Bar Association considered the impact of *Padilla* on prosecutors' ethical obligations during plea bargaining.[265] The ensuing report and recommendation urges prosecutors and defense attorneys to work together whenever possible "to identify a plea--to a felony or misdemeanor offense--that is roughly equivalent to the one charged but is safer for immigration purposes."[266]

***50** As addressed above in section II.B, the risk of deportation flowing from a plea also bears on questions of public safety that the ethical prosecutor is required to place *ahead* of the outcome in any individual case.[267] Furthermore, in many cases involving domestic violence allegations, the risk of deportation will negatively affect the complaining witness, who may lose vital financial support as well as a second parent to her children.[268] The potential for undue hardship to victims is also among the factors prosecutors are obligated to consider during plea negotiations.[269]

Engaging with immigration risks during plea negotiations requires prosecutors to consider alternative plea offers wherein the offense or sentence deviates from those originally contemplated by the charging document or the prosecutor's original offer. Professional standards explicitly authorize this practice where the alternative plea is to an offense that is supported by the factual allegations of the case.[270] Furthermore, the United States Supreme Court has sanctioned the creative negotiation of alternative pleas, acknowledging in *Padilla* that "a criminal episode may provide the basis for multiple charges, of which only a subset mandate deportation following conviction."[271]

2. Federalism Concerns

Although most state prosecutors accept that it is appropriate to consider collateral consequences generally during plea bargaining, many feel that immigration penalties are different because they are federal in nature.[272] One respondent ***51** to the Kings County survey encapsulated this view when he or she stated that "the prosecutor is not in the business of immigration policy."[273] This concern goes to the nature of the prosecutorial profession and its limits. Are state prosecutors, by making decisions during plea negotiations that will affect immigration penalties down the line, improperly or unethically interfering with functions that should be left to the federal government?

This question, rooted in federalism concerns, is premised on misapprehensions of both the role of the state prosecutor and the role of federal immigration enforcement. It is undoubtedly the role of the federal government, through agents of the Department of Homeland Security, to make determinations regarding whether the criminal grounds of deportability apply to any given noncitizen and whether she will, therefore, be deported.[274] However, Congress has written the criminal grounds of deportability so that their applicability hinges on whether an individual has been *convicted* of a crime, not on her underlying conduct.[275] In fact, immigration judges are routinely precluded from looking to evidence of a noncitizen's underlying conduct when determining whether a particular conviction triggers the criminal grounds of deportability. ***52** [276]

Congress has, therefore, left it to the criminal justice system to adjudicate a just disposition in response to allegedly unlawful conduct, only asking the federal immigration authorities to become involved once this disposition has been reached. That federal immigration authorities will become involved down the line in no way abrogates the state prosecutor's responsibility--as discussed at length in section II.A--to pursue justice in reaching that disposition. In fact, the Board of

Immigration Appeals has acknowledged the various "valid reasons" why a state criminal conviction might not reflect all aspects of the defendant's underlying conduct, including that "prosecutors may modify charges in State criminal proceedings ... to minimize the immigration consequences for criminal aliens."[277] State prosecutors' concerns regarding the impact of their actions on federal immigration enforcement resounds in the national debate over state immigration legislation. This debate recently gained national prominence when the Supreme Court considered whether Arizona's immigration ordinance, known as S.B. 1070, was preempted by federal immigration law. Ultimately the Court struck down three provisions of the law and tentatively upheld one.[278] The Arizona Legislature passed S.B. 1070 in 2010 with the stated intention of making "attrition through enforcement" Arizona's public policy.[279] The law as written, among other things, allows a state officer to make a warrantless arrest of any individual the officer has probable cause to believe "has committed any public offense that makes the person removable from the United States."[280] In *Arizona*, the Court affirmed the federal government's broad "power to determine immigration policy,"[281] striking down the warrantless arrest provision, for example, as creating "an obstacle to the full purposes and objectives of Congress" by entrusting state officers with the authority to make decisions regarding an individual's removability.[282]

***53** A state prosecutor's consideration of immigration penalties during plea bargaining, however, does not present the same preemption or federalism concerns raised by many of the provisions in state laws such as Arizona's.[283] *Arizona* in no way disturbed the long-standing principle that a state action is not preempted merely because it may *affect* a noncitizen.[284] Moreover, state prosecutors simply cannot avoid making decisions throughout the course of a criminal case that will necessarily affect a noncitizen defendant's immigration status because of the entwined nature of criminal and immigration law.[285] The same is true when state legislatures create or modify state penal codes, thereby creating intentional or unintentional ripple effects for noncitizens facing criminal charges. An amendment to a state's penal code might, for example, create a removable offense where one did not previously exist or vice versa. Were this behavior to raise preemption concerns, state legislatures across the country would be precluded from altering their own criminal codes for the realistic fear that legislated amendments might affect noncitizen defendants facing removal.

State prosecutors make decisions every day that impose consequences upon defendants in areas of law that are traditionally defined by the federal government. Many state convictions, for example, render the convicted individual unable to vote for a certain period of time or indefinitely.[286] Although Congress has ultimate authority over the regulation of voting rights,[287] it would be uncontroversial for a state prosecutor to consider during plea bargaining a ***54** conviction's impact on a defendant's ability to vote. Professor Juliet Stumpf has noted that many of the penalties triggered by state criminal convictions limit "incidents of citizenship" that are federal in nature; by attaching them to criminal conduct, our society has determined that it is sometimes appropriate to curtail these rights in order to "diminish the societal membership status of the individual convicted."[288] Decision making as to when such curtailment is appropriate is at the heart of the prosecutor's traditional role.

III. BEST PRACTICES

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

As a first step, lead local prosecutors should follow the example set by Santa Clara District Attorney Jeffrey Rosen[289] and adopt office-wide written policies that encourage the "informed consideration" and creative plea bargaining endorsed by the Supreme Court in *Padilla*.[290] As discussed above in section I.C.I, the JJJRC has already created an excellent model policy that can be modified and adopted by offices throughout the country.[291]

In order to effectively address the issues raised throughout this Article, an effective written policy should, at a minimum, include the following three points. First, it should encourage prosecutors to consider immigration-related penalties at all stages of a case and to use their discretion to reach immigration-neutral dispositions for noncitizens when appropriate. The policy should specify that to reach such dispositions, prosecutors may avail themselves of many different tools, including alternative offenses to which a defendant will plead, modified sentencing structures, and modified language in documents in the record of conviction.[292] Like the Santa Clara policy discussed above in section I.C.I, a written policy should normalize the

consideration of immigration ***55** penalties such that trial-level prosecutors should not be required to deviate from standard practice or seek permission from their supervisors to offer a modified, immigration-neutral plea.[293]

Within this first point, policies should explicitly encourage prosecutors to modify plea agreements to ensure that noncitizen defendants have equal access to alternative-to-incarceration programs. As discussed above in section I.B.2, many noncitizen defendants are effectively precluded from participating in court-ordered drug and mental health treatment programs either because of the existence of an immigration detainer[294] or because the program requires the entry of a guilty plea that will trigger irreversible immigration penalties.[295] Written policies should encourage prosecutors to consider creative solutions to this problem, such as joining in defense counsel's request to ICE to lift a detainer[296] or consenting to diversion to treatment prior to the entry of a guilty plea.

Second, lead prosecutors should include in any written policy a reminder that prosecutors are not to impose harsher or additional penalties for noncitizen defendants and ensure that written policies are not used counter to their intended purpose.[297]

Third, written policies should provide trial-level prosecutors with guidance as to when it is appropriate to alter a plea to reach an immigration-neutral disposition. Such guidance should specify that humanitarian considerations, including the hardship the defendant and her family would face should she be deported, are appropriate factors in this determination.[298]

When negotiating alternative pleas, most prosecutors will seek a disposition that is similar in nature and severity to that which would have been offered in the absence of immigration penalties.[299] This will necessarily mean that less ***56** serious charges are more likely to demand the consideration of immigration penalties, as more weighty offenses may simply not support an alternative, immigration-neutral plea. Written policies may state, as the ILRC Model Policy does, that an appropriate alternative plea will usually be mostly commensurate with the original charge and consequent penalty.[300]

Nonetheless, policies should also clarify that, in some cases, it may be appropriate for prosecutors to offer the defendant a plea to a lesser offense to compensate for the disproportionate penalties the defendant would otherwise suffer. In such cases, the prosecutor might consider seeking sentencing concessions from the defendant, such as more jail time, a longer period of probation, a steeper fine, or more days of community service. Similarly, in some cases a defendant may seek to "plead up" to a more serious offense so as to avoid immigration penalties where the risk of deportation is more daunting than the risk of jail time or a more serious criminal record.[301] Prosecutors should be aware throughout negotiations that a noncitizen defendant may already have served more time in pretrial custody than her citizen counterpart because of the existence of an immigration detainer, which often precludes release on bail.[302]

A special situation arises in localities where counsel is not appointed for minor offenses that do not carry the possibility of incarceration but do carry potential immigration consequences, as discussed above in section I.B.2. In such localities, prosecutors should consider the role they can play in ensuring compliance with the spirit of *Padilla* for unrepresented defendants. Lead prosecutors might, for example, require their trial-level prosecutors not to move forward with a plea until the judge has advised the defendant of the possibility of immigration consequences and offered her the option of consulting wim an attorney.[303]

In addition to the adoption of a formal policy on the issue of immigration ***57** penalties, management-level prosecutors must ensure that their assistant prosecutors have access to reliable sources of information regarding these penalties. Justice Stevens's vision of creative plea bargaining that furthers the interests of the state and the defense rests on the "informed consideration" of immigration penalties by both sides.[304] Despite herculean efforts by nonprofit immigrant advocacy organizations across the country,[305] both the defense and prosecution bars have a long way to go until achieving this goal. As discussed above in section I.C.2, respondents to the Kings County survey, the vast majority of whom claim to be at least ""somewhat familiar" with the immigration consequences of New York Penal Law, are largely reliant on their own research and previous work experience as their source for this knowledge.

When considering trainings and resource provision for prosecutors, the question naturally arises as to where the burden falls when defense counsel and the prosecution are negotiating a plea that may trigger immigration penalties. Does the burden fall entirely on the defense attorney to have mastered the immigration consequences, and should the prosecutor simply trust her understanding? Does the burden fall to the prosecutor to corroborate claims made by defense counsel? Should the prosecutor educate herself regarding these issues independently? Pursuant to *Padilla* and the Sixth Amendment, it is clear that the burden falls to defense counsel.[306] Yet, as I have argued above in section II.C.l, prosecutors cannot effectively carry out their

professional and ethical obligations without considering immigration-related penalties, requiring them to be at least reasonably well educated on the law.[307]

Ideally, prosecutors' offices will provide their trial-level attorneys with in-house training regarding the immigration penalties of crimes and the consideration of these penalties during case processing. In instances where this is not feasible, offices should arrange for trainings by organizations that have traditionally trained the criminal defense bar.[308] To supplement hands-on trainings, offices may look to the substantial amount of internet-based material that is devoted to immigration consequences of various state and federal offenses, which are mainly created by immigrant advocacy groups for the defense bar.[309] ***58** In-house training on immigration penalties of crimes must be complemented by training and supervision on larger questions relating to the exercise of prosecutorial discretion, with a focus on the role of such discretion when seeking just resolutions during plea bargaining.[310]

Even prosecutors who are well trained regarding the immigration penalties of crimes will be unable to thoroughly analyze the immigration-related penalties of any given offer because they do not have--and should not have--access to pertinent information, such as the defendant's exact immigration status and years of residence in the United States.[311] Best practices for implementing the letter and spirit of *Padilla*, therefore, require a relatively collaborative effort between the state and the defense with the goals of, first, a well-informed understanding of the immigration penalties attached to a criminal charge and, second, the humane consideration of those penalties in the pursuit of a just disposition.

CONCLUSION

Justice Stevens's finding that the informed consideration of immigration penalties during plea bargaining furthers the interests of both the defense and the state calls to mind the late Professor Derrick A. Bell, Jr.'s groundbreaking theory of "interest convergence."[312] This theory proposes that the interests of a minority group will only be accommodated when they overlap with the interests of the majority group in power. Decades after presenting the theory in the context of the Supreme Court's decision in *Brown v. Board of Education*, Professor Bell acknowledged that interest convergence can be a "useful strategy" for advancing racial justice goals but hoped that advocates would also remember to "show a due regard for our humanity" in challenging accepted societal norms and practices.[313] Noncitizens facing criminal charges are some of the most ***59** vulnerable members of our society. The overlapping interests of the prosecution and defense bars, as identified by Justice Stevens and explored in this Article, should prompt both local prosecutors and defense counsel to engage with immigration penalties during the prosecution of noncitizen defendants. It is my further hope that doing so will open the door to a broader understanding of the pursuit of a merciful and proportionate justice.

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231	APPLIED RE Communities, counties with deported paren
232	Of course, this *Los Angeles Ti* who began "sh for selling a $1 1998. His moo
233	*See* CHAUDR
234	*See, e.g.*, INST ON FAMILY peer-reviewed homes are mo RES. ON AD controlling for A. Johnson, *A* that, controllin families show
235	*See* Harper & M that she and he with Junck, *sup*
236	*See* MARK E YOUTH: OUT
237	*See id.* at 68 (f seventeen, and arrested, twenty
238	*See id.* at 69.
239	*See id.* at 22-69
240	*See* Butcher &
241	From 2010-201 citizen wife an suffered from v 68 above, on th deported. Duri reliant on food basic day-to-da

242	*See* CHAUDR
243	*See id.* at 29.
244	*See id.* at 30-31
245	*See id.* at 31-32
246	*See id.*
247	*See id.* at 35.
248	*See id* at 36-37
249	*See id.* at 37.
250	*See, e.g.*, NDA ... ensuring ... witness satisfa conduct. *See* A
251	*See* Johnson, *su*
252	*Id.*
253	Interview with
254	*See* ABA CRI (2010) [herein wants the prot child support o
255	*See* AM PROS
256	*See* Bruce A. C (2011).
257	MODEL RULE 1-1.2; ABA ST seek justice, no
258	*See* Ellen Yaro CIV. RRS. L. and ultimately disposition. W accountability large extent ... original) (quoti
259	*See* Fred C. Za
260	*See* O'Hear, *su* litigation exper *as Disaster*, 10 making them n note 203, at 72

	see also Samue
261	NDAA NAT'L
262	*See id.* §5-3.1 considerations' defendant is c (2002) [hereina
263	*See* Bibas, *su* understanding evaluate wheth
264	Padilla v. Kent
265	*See* ABA Reco
266	*See id.* The Re required, while rather than 365 negotiated to m
267	*See* NDAA NA
268	Respondent 11 stating that "[t] defendant in th
269	*See* NDAA NA 262, at 9-27.42
270	*See* FED. R. C dismissal of o prosecutors ma to "another off 262, at 9-27.43 OF GUILTY, *s* of guilty or nol
271	Padilla v. Ken dissenting) (dis to avoid deport
272	Concerns regar to an open-end indicates. Davi concern surfac policy discusse immigration la seek immigrati with Vargas, *su*
273	Respondent nu the role of the p
274	*See* Arizona v. whether it is a relations and m Immigration R Whiting, 131 S

275	*See, e.g.*, INA (11th Cir. 201 courts of appe individualized of the term "co in some cases 212(a)(2)(C), 8 General knows irrelevant to th plea negotiatio 4972451, at * respondent's w was only convi
276	*See, e.g.*, Gonz 2008).
277	*Velazquez-Her*
278	*See Arizona*, a *e.g.*, United Sta state immigrati ACTION CTF July 26, 2012).
279	*See* Support Ou
280	*Id.* § 6.
281	*Arizona*, at 3.
282	*Id.* at 18-19. In country, and th Bica, 424 U.S. 99-603, 100 St
283	When the Dep preemption co really want sta preemption co Kings County stating, "It see failed to act wh
284	*See DeCanas*, of immigration Alabama, 813 of the state law by federal law conditions und 2011).
285	*See supra* secti
286	*See* Elise articles.latimes
287	*See* U.S. CON Congress 'the

	U.S. Term Lim
288	Stumpf, *supra*
289	For a discussio
290	Padilla v. Kent the prosecutori section II.A.2.
291	*See* ILRC Mod
292	For a detailed d an immigration
293	As discussed a immigration p properly advise both penal- and
294	*See* Shah, *supra*
295	For a discussio program may t
296	*See, e.g.*, IMM providers work participate in d
297	The ILRC Mo Model Policy,
298	For a discussio discussion of p
299	Special Assist immigration-ne offered plea or
300	*See* ILRC Mod
301	For an example Ct. App. Sept. accepted a plea to transportatio because it inclu
302	An immigratio individual for 287.7(a), (d) (2 *supra* note 118 detention and e
303	For a more de inquiring into t
304	*See* Padilla v. K
305	*See* Raghu, *sup*

306	*See Padilla*, 13
307	Given the fisc Supervising At best pursue jus services. Interv
308	*See* Brief of th S. Ct. 1473 (20
309	*See id.* (listing attorneys in a IMMIGRATIO
310	The American justice professi discretion." www.american 2012). My than
311	*See* VARGAS is necessary to 101.
312	Professor Bell with the interes REV. 518, 523 interest in reco industrializatio *Brown v. Boar* many importan
313	*See* Derrick A.