2016

IMMIGRATION PROSECUTORS AND DEMOCRACY

Ingrid V. Eagly[*]

INTRODUCTION

Over the past few decades, the United States criminal justice system has played an increasingly central role in immigration enforcement. In the federal criminal system, immigration crime now constitutes almost half of all crimes prosecuted by federal prosecutors.[1] In local and state criminal systems, criminal convictions can lead to swift deportation.[2] Federal immigration enforcement policies have not only increased the volume of deportations to record highs,[3] but have also prioritized the deportation of immigrants who come into contact with the criminal justice system.[4] Even immigrants arrested or convicted of low-level criminal offenses have been swept up in immigration enforcement efforts.[5] The end result is that American criminal prosecutors have unprecedented power over the deportation of noncitizens.

---

[*] Professor of Law, UCLA School of Law.

[1] In the year ending September 30, 2014, immigration crimes constituted 45 percent of criminal offenses disposed of by federal district and magistrate judges. Thomas F. Hogan, *Judicial Business of the United States Courts: 2011 Annual Report of the Director*, ADMIN. OFFICE OF THE U.S. COURTS tbl.D-4, tbl.M-2 (2014).

[2] Ingrid V. Eagly, *Local Immigration Prosecution: A Study of Arizona Before SB 1070*, 58 UCLA L. Rev. 1749 (2011).

[3] Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 NYU L. REV. 1126 (2013).

[4] *See generally* Memorandum from John Morton to All ICE Employees, Civil Immigration Enforcement, March 2, 2011, *available at* http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf (prioritizing the removal of criminal aliens).

[5] *See* AARTI KOHLI ET AL., CHIEF JUSTICE WARREN INST. ON LAW & POLICY, SECURE COMMUNITIES BY THE NUMBERS: AN ANALYSIS OF DEMOGRAPHICS AND DUE PROCESS 8 (2011), *available at* http://www.law.berkeley.edu/files/Secure_Communities_by_the_Numbers.pdf.

The almost unilateral authority of the American prosecutor over criminal justice outcomes is a subject of frequent academic commentary.[6] To be sure, criminal law scholars have emphasized the rampant race and class inequality within the criminal justice system.[7] Yet, the prosecutor's de facto power over immigration adjudication has proceeded quietly and garnered far less academic scrutiny.[8] Although this chapter discusses on prosecutors in the United States, criminal prosecutors in other countries have similarly seen their institutional function expand into immigration enforcement, with few systemic controls in place to limit these powers.[9]

In this chapter, I critique the unchecked immigration power of American prosecutors. In state and federal systems alike, prosecutors can be incentivized to bring cases based on the immigration consequence of the prosecution—rather than to focus on the most serious crimes deserving of prosecutorial attention. Prosecutors closely aligned with immigration enforcement may also draw on civil enforcement tools, such as immigration detention and the threat of deportation, in ways that distort and undermine the protections normally afforded by criminal procedure rules. Prosecutorial control over immigration outcomes is also increasingly tied to more severe punishment of noncitizens than citizens in the form of longer sentences, under more punitive conditions, buttressed by harsh civil collateral consequences.

The end result of the growing prosecutorial control over immigration enforcement is a criminal justice regime for immigrants that extends beyond the institutional role granted to prosecutors by legislatures drafting the criminal law

---

[6] *See, e.g.*, ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR (2007) (add parenthetical); Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989 (2006) (arguing that the criminal law operates like an administrate state with almost no institutional checks); Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 34 AM. J. CRIM. L. 223 (2006) (add parenthetical).

[7] *See, e.g.*, DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (1999); Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946 (2002).

[8] *But see* Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613 (2012); Ingrid V. Eagly, *Prosecuting Immigration*, 104 N.W. U. L. REV. 1281, 1289 (2010); David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157 (2012).

[9] For useful examples of exploration of these issues outside the United States, see, *e.g.*, Ana Aliverti, *Exploring the Function of Criminal Law in the Policing of Foreigners: The Decision to Prosecute Immigration-Related Offenses*, 21 SOC. & LEGAL STUDIES 511 (2012); Mary Bosworth & Mhairi Guild, *Governing Through Migration Control: Security and Citizenship in Britain*, 48 BRITISH J. OF CRIMINOLOGY 703 (2008); Alessandro De Giorgi, *Immigration Control, Post-Fordism, and Less Eligibility: A Materialist Critique of the Criminalization of Immigration across Europe*, 12 PUNISHMENT & SOC. 147 (2010).

and by courts constructing procedural rules. Moreover, this citizenship inequality disproportionately affects racial and ethnic minorities, who become easy targets for immigration policing.[10]

In the context of this volume on the relationship between prosecutors and democracy, it is important to acknowledge that any discussion of immigration prosecution and democracy is complicated by the fact that democracies themselves are inherently exclusionary. The rights and privileges of membership, such as equality, are presumptively universal for *members* of the society. Yet, by many accounts, immigrants—particularly those convicted of crimes—are not full-fledged members of American society.[11] As Juliet Stumpf has argued, the merger of criminal and immigration control into one forceful "crimmigration" system is at its core about democratic membership and exclusion.[12] Both immigration and criminal law function in practice as "gatekeepers" to define and segregate society, to "determine whether and how to include individuals as members of society," and to "expel from society those deemed criminally alien."[13]

The fundamental problem that I address in this chapter is the unfettered merger between criminal prosecutorial powers and immigration enforcement. In practice, the criminal justice system has borrowed the membership and exclusion rules of the immigration system and used them to distribute procedural protections and impose criminal sanctions. Addressing this problem requires criminal justice actors to move beyond the immigration system's defined boundaries of membership and toward what Linda Bosniak has termed a "universalist ethic" for rights distribution.[14] Put differently, all persons subject to the American criminal justice system should be granted full membership rights, including equal protection from prosecutorial abuses and similar treatment for similar crimes.[15] This chapter concludes by making several proposals to con-

---

[10] *See, e.g.,* Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 87 U. CHI. L. REV. 87 (2013) (add parenthetical); Kevin R. Johnson, *Racial Profiling in the 'War on Drugs' Meets the Immigration Removal Process: The Case of* Moncrieffe v. Holder, 48 U. MICH. J.L. REFORM 967 (2015) (add parenthetical).

[11] HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES (2006).

[12] Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2007).

[13] *Id.* at 376, 397.

[14] LINDA BOSNIAK, THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP, 2 (Princeton University Press 2006).

[15] As Jerry López forcefully advocates, "pursuit of radical democracy" means achieving a world in which "equal citizenship is a concrete everyday reality and not just a vague prom-

strain prosecutorial power and make the system more equal, less punitive, and more consistent with democratic ideals.[16] Together, these and other criminal justice reforms would begin to return immigration decisionmaking to the immigration courts—and refocus criminal prosecutors on their assigned task of enforcing the criminal law.

I. IMMIGRATION ENFORCEMENT'S THREAT TO THE PROSECUTORIAL FUNCTION

This Part discusses two ways in which the blurring of immigration enforcement with prosecutorial function has distorted the criminal justice system. First, the prosecutor's ability to trigger immigration enforcement raises concerns about prosecutorial motivation. Specifically, prosecutors may seek criminal charges pretextually to incapacitate immigrant defendants through deportation. Second, the merging of criminal and immigration enforcement raises procedural justice concerns. That is, prosecutors may use their immigration powers in ways that bypass the protections that are normally part of the criminal process, thereby fostering unequal treatment based on citizenship status.

A. Pretextual Prosecution

Pretextual prosecution generally occurs when someone is suspected of a greater crime, but instead prosecuted with a different, lesser crime.[17] Routine in both federal and state courts, such prosecutions are a tool by which prosecutors target elusive defendants with lower-level criminal behavior that can be more readily proven.[18] As Bill Stuntz has succinctly put it, pretextual prosecution occurs when prosecutors "go after not *crimes* but *criminals*."[19] Normative

---

ise." Gerald P. López, *Changing Systems, Changing Ourselves*, 12 HARV. LATINO L. REV. 15, 31 (2009).

[16] *Cf.* James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521 (1981) (proposing "decent constraints" to curb prosecutorial discretion from legislatures, sentencing judges, and defense lawyers).

[17] Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, __ (2005).

[18] For example, Stuntz and Richman explain that pretextual prosecution may exist in state courts in drug cases, particularly when someone believed to be a drug dealer is charged with possession of small amounts of drugs. *Id.* at 608. Professor Erin Murphy has shown how process crimes—such as perjury or failure to appear—can be used in lieu of pursuing the "real" criminal behavior. Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, 97 GEO. L.J. 1435, 1442 (2009).

[19] William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1998 (2008)

critiques of pretextual prosecution have focused on how their lack of transparency undermines the public prosecutor's legitimacy.[20]

The movement of immigration enforcement into criminal courts has heightened the problem of pretextual prosecution. In Los Angeles, for example, the county District Attorney collaborated with federal prosecutors in an effort to target suspected gang members with illegal reentry prosecutions.[21] The then-District Attorney Steven Cooley described the program as "an initiative I have decided to undertake and encourage because a good chunk of our gang problem in Los Angeles County is committed by individuals who have been previously deported and then re-entered the country."[22] In other words, prosecutors wanted to pursue suspected gang members for higher-order crimes, but realized that they could use the illegal reentry statute to easily incapacitate this population. Illegal reentry cases are notoriously easy to prove and result in astonishingly high guilty plea rates.[23] Rather than proving the drug distribution conspiracy or violent acts proliferated by urban gangs, prosecutors simply have to prove that the individual was previously deported and did not have permission to return to the United States. Over the past two decades, the number of illegal reentry crimes skyrocketed to historic highs, with federal prosecutors claiming they were using the steep punishments of the illegal reentry law to incapacitate the "worst of the worst."[24]

State prosecutors can also target immigrant populations deemed criminal by using low-level state crimes as pretext. In this approach, which I have called an "immigration enforcement model" for criminal adjudication, deportation is

---

[20] Richman & Stuntz, *supra* note 17, at __ (arguing that pretextual prosecution is a concern because it lacks transparency and undermines prosecutorial credibility); Lisa Griffin, *Criminal Lying, Prosecutorial Power, and Social Meaning*, 97 CAL. L. REV. 1515 (2009) (arguing that pretextual federal prosecutions reduce the transparency of the criminal system); Harry Litman, *Pretextual Prosecution*, 92 GEO. L.J. 1135, 1149 (2004) (pretextual prosecutions raise a number of concerns, including the "appearance of impropriety" and inappropriate "institutional roles); Murphy, *supra* note 18, at 1497 (explaining that pretextual prosecutions raises "familiar concerns about transparency, state legitimacy, and self-dealing").

[21] *See generally* Jennifer Chacón, *Whose Community Shield?: Examining the Removal of the "Criminal Street Gang Member,"* U. CHICAGO L. FORUM (2007).

[22] Troy Anderson, *Prosecutors Join Anti-Gang Effort; D.A., City Attorney to Focus on Deportation of Illegals*, DAILY NEWS (April 6, 2007) (quoting District Attorney Steve Cooley).

[23] Eagly, *supra* note 8, at __.

[24] Letter from Maria Stratton, Federal Public Defender to U.S. Sentencing Commission, Sept. 25, 2003, http://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20030923/stratton.pdf (noting that the U.S. Attorney's Office "conserved its [illegal reentry] resources for prosecuting only the "worst of the worst").

not just a collateral consequence, but rather the desired prosecutorial goal.[25] For example, in most states driving without a license can subject a driver to criminal prosecution.[26] In an age of vigorous immigration enforcement, however, criminalization of driving without a license intersects with state laws that prohibit the undocumented from obtaining driver's licenses.[27] Local discretion over the enforcement of license laws during routine traffic stops thus has a profound effect on the undocumented population.[28] Identity-related crimes, such as document fraud, provide another tool that prosecutors can use in ways that target immigrants.[29] From the state vantage point, these low-level crimes can serve as pretext for the greater objective, which is incapacitation of the immigrant by way of deportation from the United States. Even the most minor traffic offense can result in the immigrant being transferred into immigration detention and deported.

Pretextual prosecutions against immigrants can have unintended consequences. In the federal system, substitution of immigration crimes for the serious harm of violent criminal activity diverts prosecutorial resources from the crimes most in need of prosecution and thereby undermines the moral authority of the criminal law.[30] Similarly, in the state system, the pursuit of low-level

---

[25] Eagly, *supra* note 3, at __. *See also* Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. (forthcoming 2016) (identifying a "collateral enforcement model" of criminal adjudication).

[26] CAL. VEHICLE CODE § 14601.1 (driving with a suspended or revoked license); CAL. VEHICLE CODE § 12500 (driving without a license); CAL. VEHICLE CODE § 14602.6 (allowing for impounding of vehicle if driving without a license); ARIZ. REV. STAT. ANN. § 28-3380 (a person who operates a motor vehicle in violation of a driver license restriction is guilty of a class 2 misdemeanor); TEXAS TRANSPORTATION CODE § 521.457 (driving while license invalid).

[27] All but a few states, require proof of lawful presence in the United States in order to obtain a driver's license. Since the passage of the federal REAL ID Act in 2005, the number of states that offer driver's licenses to undocumented residents has dwindled. REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 231, 302-23 (giving states the option to issue licenses to undocumented residents, but requiring that the license have a unique design and color and say on its face that it cannot be accepted by the federal government).

[28] *See generally* Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 1031 (2002) ("Any discussion of race and policing that excludes an examination of traffic stops is necessarily incomplete.").

[29] For example, state criminal codes punish possession of false or misleading identity documents or providing false information regarding one's identity to law enforcement. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-2002(A) (possession or presentment of a false document); TEX. PENAL CODE ANN. § 38.02(b) (Vernon Supp. 2009) (giving false information to a peace officer).

[30] *See generally* Ana Aliverti, *The Wrongs of unlawful Immigration*, __ CRIMINAL LAW AND PHILOSOPHY __ (2015).

charges against immigrants to achieve the collateral sanction of deportation effectively transfers federal immigration enforcement decisions to county criminal prosecutors. Studies have found that the incentive to trigger deportation through the criminal process is associated with the targeting of racial minorities for low-level crimes such as traffic offenses.[31] This type of profiling is of course objectionable on its own,[32] but when the targets are immigrants, such discriminatory enforcement can also trigger the harsh sanction of immigration enforcement.[33] This outcome is especially problematic given that the lion's share of criminal law is prosecuted by local criminal prosecutors who are not accountable to the Executive and lack any formal authority to enforce the immigration law.[34] The movement of enforcement discretion into the realm of criminal prosecutors and courts thus makes immigration enforcement less accountable and not at all transparent.[35]

B. Procedural Equality

Up to this point I have argued that the availability of immigration-related crimes and the collateral sanction of deportation can result in pretextual prosecution. A second important aspect of this dynamic is the dilution of procedural protections, which results in easier convictions, fewer trials, and harsher punishments. Here, I briefly explore a few examples of such distortions.

The merger of immigration enforcement and criminal prosecution has resulted in the unjust denial of pretrial release for noncitizens. When noncitizen defendants are released on bond in their criminal case, often they will be transferred into federal immigration custody. These transfers occur because of what is known as an "immigration detainer," which essentially is a request by federal

---

[31] *See* HARRY G. LEVINE & DEBORAH PETERSON SMALL, MARIJUANA ARREST CRUSADE: RACIAL BIAS AND POLICE POLICY IN NEW YORK CITY, 1997-2007 at 8 (April 2008), *available at* http://www.nyclu.org/files/MARIJUANA-ARREST-CRUSADE_Final.pdf.

[32] Angela J. Davis, *In Search of Racial Justice: The Role of the Prosecutor*, 16 N.Y.U. J. LEGIS. & PUB. POLICY 821, 829 (2013) (discussing the serious problem of racial profiling of African Americans and Latinos).

[33] TREVOR GARDINER II & AARTI KOHLI, THE C.A.P. EFFECT: RACIAL PROFILING IN THE ICE CRIMINAL ALIEN PROGRAM (Sept. 2009), https://www.law.berkeley. edu/files/ policybrief_irving_ 0909_v9.pdf (finding that Latinos comprise 93% of individuals taken into custody after local arrests, despite the fact that they only comprise 77% of the undocumented population); ANDREA GUTTIN, THE CRIMINAL ALIEN PROGRAM: IMMIGRATION ENFORCEMENT IN TRAVIS COUNTY, TEXAS, IMMIGR. POL'Y CENTER at 12 (Feb. 2010), *available at* http://www.immigrationpolicy.org/sites/default/files/docs/Criminal_Alien _Program_021710.pdf [http://perma.cc/YGK5-SVWJ].

[34] Arizona v. United States, 132 S. Ct. 2492, __ (2012).

[35] *See generally* Rick Su, *Police Discretion and Local Immigration Policymaking*, 79 UMKC L. REV. 901 (2011).

authorities to be notified if an immigrant is to be released from criminal custody.[36] Thus, while eligible citizens granted bond can be released to their families, who may assist in their defense, similarly situated noncitizens will languish in immigration detention if they cannot obtain an immigration bond. Remaining detained prior to trial is correlated with higher rates of conviction and more severe sentences.[37] Some efforts to reform detainer policy are underway,[38] but it is not yet clear that immigrants will in fact obtain the same right to bail in their criminal cases as their citizen counterparts.

The ready availability of deportation as a consequence of a criminal conviction can also incentivize prosecutors to avoid other procedural protections. Paul Crane has argued persuasively that an immigration enforcement approach can result in a new form of pretextual prosecution designed to avoid the standard rules of criminal procedure.[39] With this approach, which he calls "strategic undercharging," prosecutors bring misdemeanors rather than felonies, knowing that misdemeanors can yield the same potent deportation penalty as the harder-to-prove felony. Misdemeanor charges also allow prosecutors to bypass the procedural entitlements that attach to felonies, such as rights to grand jury, a preliminary hearing, increased discovery, and jury trial. According to Crane, prosecutors choose this easier path because they "can still achieve their most desired penalty without having to endure the greater costs generated by felony prosecutions."[40]

Current prosecutorial practices have also resulted in systematically harsher punishments for immigrants than for their citizen counterparts. An important new study by sociologist Michael Light documents such disparities, with

---

[36] 8 C.F.R. § 287.7 (2015). Current guidance stresses that agents should take care when issuing detainers against lawful permanent residents, but does not prohibit the practice. U.S. Immigration and Customs Enforcement, Interim Policy No. 10074.1: Detainers, § 4.6 (Sept. 2, 2010).

[37] *See, e.g.*, Charles E. Ares et al., *The Manhattan Bail Project: An Interim Report on the Use of Pretrial Parole*, 37 N.Y.U. L. REV. 67, 84-86 (1963) (establishing that defendants who are incarcerated pending trial are more likely to be convicted than those at liberty to prepare for trial); Patricia Wald, *Pretrial Detention and Ultimate Freedom: A Statistical Study*, 39 N.Y.U. L. REV. 631 (1964); Anne Rankin, *The Effect of Pretrial Detention*, 39 N.Y.U. L. REV. 641 (1964).

[38] A new program to cooperate with local law enforcement, known as the Priority Enforcement Program, or PEP, promises to move away from the traditional immigration detainer and instead issue notification requests to ask that the locality notify immigration authorities 48 hours prior to an immigrant's scheduled release from criminal custody. *See generally* Juliet P. Stumpf, *D(e)volving Discretion: Lessons From The Life and Times of Secure Communities*, 64 AM. U. L. REV. 1259 (2015).

[39] Paul T. Crane, *Charging on the Margin*, 57 WM. & MARY L. REV. __ (forthcoming 2016).

[40] *Id.* at __.

noncitizens receiving harsher criminal sentences than citizens in federal courts.[41] For instance, his data reveal that 96 percent of convicted noncitizens received a prison sentence, compared to only 85 percent of United States citizens.[42] This noncitizen sentencing penalty was not explained by factors normally associated with sentencing severity, such as the seriousness of the offense or criminal history.[43]

Also demanding attention are the conditions under which noncitizens must serve their sentences. As Emma Kaufman's probing research documents, the federal Bureau of Prisons has created a separate carceral system—known as Criminal Alien Requirement ("CAR") prisons—to punish noncitizen offenders.[44] These prisons house exclusively noncitizens, are run by for-profit companies, and reserve ten percent of bed space for extreme isolation.[45] Compared to other Bureau of Prisons facilities, CAR prisons offer less programming, such as drug treatment and work opportunities.[46] In state systems, other types of punishment inequality exist, including the fact that state laws and policies often render noncitizens ineligible for less severe forms of punishment, such as probation or halfway houses.

This unequal and punitive treatment of immigrants is particularly misplaced in view of the lack of any empirical evidence to support the view that immigrants are more criminally inclined than citizens. To the contrary, research has consistently found that the foreign-born have a lower crime rate than native-born citizens.[47] Moreover, researchers have not found immigrant communities to be less crime ridden,[48] in part because structural features of immigrant

---

[41] Michael T. Light, *The New Face of Legal Inequality: Noncitizens and the Long–Term Trends in Sentencing Disparities across U.S. District Courts*, 1992–2009, 48 LAW & SOC'Y REV. 447 (2014) (arguing data shows a non-citizenship "penalty" at sentencing).

[42] *Id.* at __ (citing data from 2008).

[43] *Id.* at __.

[44] Emma Kaufmann, *Legitimate Deference in Constitutional Prison Law* (draft on file with author). For an important introduction to the American prison system, see Sharon Dolovich, *Incarceration American-Style*, 3 HARV. L. & POL'Y REV. 237 (2009).

[45] *Id. See also* American Civil Liberties Union, Warehoused and Forgotten: Immigrants Trapped in Our Shadow Private Prison System, June 2014, *available at* https://www.aclu.org/sites/default/files/field_document/060614-aclu-car-reportonline.pdf.

[46] *Id.* at 4.

[47] *See, e.g.*, Rubén G. Rumbaut et al., *Debunking the Myth of Immigrant Criminality: Imprisonment Among First- and Second-Generation Young Men*, MIGRATION INFORMATION SOURCE (June 2006), http://www.migrationinformation.org/usfocus/display.cfm?ID=403.

[48] *See, e.g.*, Garth Davies & Jeffrey Fagan, *Crime and Enforcement in Immigrant Neighborhoods: Evidence from New York City*, 641 ANNALS AM. ACAD. POL. & SOC. SCI. 99, 116–17 (2012) (concluding that immigrant neighborhoods have less crime than native-born

families (such as intact, two-parent households) are associated with neighborhood crime rate stabilization.[49]

In sum, the immigration-criminal nexus allows prosecutors to borrow from the immigration enforcement regime in ways that can distort the normal set of procedural protections and sanctions that are dispensed.[50] As David Sklansky has noted, this type of flexibility is part of a broader trend to think about "legal rules and legal procedures simply as a set of interchangeable tools," which he calls "ad hoc instrumentalism."[51] In these ways, the noncitizen defendant becomes susceptible to criminal justice outcomes that are decidedly less individualized and often more punitive than those of citizens.

II. REFORM

As I detailed in Part I, American prosecutors have expansive control not only over their criminal cases, but also over immigration outcomes for noncitizen defendants. Compounding these problems, prosecutors can use these de facto immigration powers to engage in pretextual prosecutions and avoid procedural protections that would otherwise apply. Within this system, immigrants are subject to punishments that are harsher than those of their citizen counterparts.

It is unclear who is watching the prosecutors. The techniques for taking advantage of these immigration powers are often applied behind the scenes and

---

neighborhoods, but that the level of reduction varies across racial and ethnic groups); Ramiro Martinez, Jr. & Jacob I. Stowell, *Extending Immigration and Crime Studies: National Implications and Local Settings*, 641 ANNALS AM. ACAD. POL. & SOC. SCI. 174, 186 (2012) (finding no evidence, based on a comparative study of San Antonio and Miami, "that more immigrants meant more homicide or that more neighborhood immigration meant more violence"); Jacob I. Stowell et al., *Immigration and the Recent Violent Crime Drop in the United States*, 47 CRIMINOLOGY 889, 889 (2009) (reporting that violent crime rates in certain metropolitan areas tended to decrease as the immigrant concentration increased over time); Tim Wadsworth, *Is Immigration Responsible for the Crime Drop? An Assessment of the Influence of Immigration on Changes in Violent Crime Between 1990 and 2000*, 91 SOC. SCI. Q. 534, 546 (2010) (concluding that cities with the largest increases in immigration in the 1990s experienced the largest decreases in violent crime).

[49] Graham C. Ousey & Charis E. Kubrin, *Exploring the Connection Between Immigration and Violent Crime Rates in U.S. Cities, 1980–2000*, 56 SOC. PROBS. 447, 463–64 (2009) (arguing that immigration lowers violent crime rates because it is correlated with the stabilizing effect of two-parent family structures).

[50] Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543 (2011).

[51] Sklansky, *supra* note 8, at __.

out of view. Moreover, there is no transparent system of checks and balances, such as explicit constitutional constraints or independent oversight.[52]

Nonetheless, there are a range of strategies that could be pursued to increase the checks on prosecutorial power over immigration. This Part introduces four possible strategies, each of which fosters different institutional counterweights for prosecutorial control. First, prosecutor offices should adopt plea bargaining guidelines that make the process more transparent for the public. In particular, such guidelines should require prosecutors to take the collateral consequence of deportation into account in arriving at a just plea offer. Second, more judicial oversight is needed. Criminal court sentencing judges should be given the assess the merits of individual cases and override prosecutors by recommending against an unjust deportations. Third, resources should be dedicated to ensuring that the criminal justice system achieves its adversarial ideal. In the immigration context this measure would ensure that public defender offices are given adequate resources to provide quality and comprehensive representation for noncitizen clients. Fourth, immigrant communities must organize to change the system from the ground up.

Of course, this list is not exhaustive. There no doubt are other worthy policy solutions. In addition, it is important to clarify that my focus here is on the institution of criminal justice, not the immigration system. Changes in the immigration law, including creating more forms of discretionary relief for those with criminal convictions, could also help disentangle criminal justice adjudication from immigration enforcement.[53]

A. Requiring Prosecutors to Consider Collateral Consequences in Reaching Just Plea Bargains

At least 95 percent of today's criminal cases are resolved by plea, rather than trial.[54] Within this plea bargained system, prosecutors hold the power not only to make charging decisions, but also to dictate the terms of a plea agreement and determine the sentence. Holding all of this power within one single

---

[52] Marc Miller and Ronald Wright have demonstrated that peering inside the "black box" of internal prosecutorial regulation is rare given that "the absence of controlling statutes or case law makes it possible for prosecutors to do their daily work without explaining their choices to the public." Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 129 (2008).

[53] For some thoughts on what these reforms might look like, see DANIEL KANSTROOM, DEPORTATION NATION: OUTSIDERS IN IMMIGRATION HISTORY (2007).

[54] Lafler v. Cooper, 132 S. Ct. 1376, 1384, __ (2012).

actor, as Rachel Barkow has shown in a series of persuasive articles, can lead to unjust results.[55]

The great majority of convictions in this new "post-trial world" are misdemeanors.[56] These misdemeanor convictions do not typically result in incarceration, but rather alternative sanctions such as fines or supervision.[57] For those convicted of these lower-level crimes, collateral consequences such as deportation are the most severe aspect of a misdemeanor conviction. For immigrants subject to possible deportation, even minor cases can result in lifetime banishment.[58]

The Supreme Court's 2010 decision *Padilla v. Kentucky* announced a Sixth Amendment obligation of criminal defense counsel to advise noncitizens of the potential immigration consequences of a guilty plea.[59] The Court characterized deportation as a "drastic measure" that is an "integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specific crimes."[60] Moreover, the Court explained that deportation's "close connection to the criminal process" makes it "uniquely difficult to classify as either a direct or collateral consequence."[61]

The centrality of plea bargaining—and the reality of deportation as a consequence of many pleas—makes criminal prosecutors what immigration scholar Stephen Lee has aptly termed "gatekeepers" to the immigration removal sys-

---

[55] *See, e.g.*, Rachel Barkow, *Institutional Design and the Policing of Prosecutors*, 61 STAN. L. REV. 869 (2009).

[56] Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, __ (2014).

[57] Sean Rosenmerkel, Matthew Durose & Donald Farole, Jr., Ph.D., *Felony Sentences in State Courts*, 2006, at __, Bureau of Justice Statistics Bulletin (Dec. 2009, NCJ 226846). Revised 11/22/2010; Issa Kohler-Hausmann, *Misdemeanor Justice: Control Without Conviction*, 119 AM. J. SOC. 351, 374 (2013). *See generally* Beth A. Colgan, 102 CAL. L. REV. 277, __ (2014) (documenting the harmful consequences of fines for those unable to afford them, including incarceration, exclusion from public benefits, and persistent poverty).

[58] *See generally* Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751 (2013); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277 (2011); Jordan Cunnings, *Nonserious Marijuana Offenses and Noncitizens: Uncounseled Pleas and Disproportionate Consequences*, 62 UCLA L. REV. 510 (2015).

[59] Padilla v. Kentucky, 130 S. Ct. 1473 (2010) (holding that a defense attorney's failure to advise his client of the immigration consequence of a guilty plea falls below the minimum standard for effective counsel).

[60] *Id.* at 1480.

[61] *Id.* at 1482.

tem.[62] The Supreme Court, for its part, stressed in *Padilla* that taking deportation consequences into account in the plea bargaining process could encourage pleas that "better satisfy the interests of both parties."[63] Defense counsel may be able 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."[64] Prosecutors can also benefit because "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."[65]

One way to implement *Padilla* is by requiring prosecutors to consider immigration status in plea bargaining. Office-wide policy guidelines that define parameters for considering when collateral punishment is disproportionate to the crime can make clear to line prosecutors that immigration status is something that they should in fact consider in arriving at a just case outcome. As Norm Abrams has argued, internal guidelines for prosecutor offices are an important tool to achieve "tolerable consistency" and efficiency in the exercise of prosecutorial discretion.[66] Professor Angela Davis has also expressed optimism about the potential for prosecutors to use their "power and discretion to help" improve the criminal justice system by implementing internal policies that constrain potential bad actors.[67] For example, the serious problem of racial discrimination in drug prosecutions can be addressed by creating an office-wide policy to decline to charge certain drug cases and instead refer arrestees to drug treatment programs.[68]

Despite the Supreme Court's sound logic, prosecutors have not traditionally considered collateral consequences in the plea bargaining context. The year after the *Padilla* decision, I surveyed fifty of the largest county-level prosecutor offices located in the five states with the highest levels of noncitizen prisoners (Arizona, California, Florida, New York, and Texas).[69] Out of the fifty offices

---

[62] *See* Stephen Lee, *De Facto Immigration Courts*, 101 CALIF. L. REV. 553, 608 (2013) (demonstrating that *Padilla* "increased the ability of prosecutors to act as gatekeepers within the larger [immigration] removal system").

[63] *Padilla*, 130 S. Ct. at 1486.

[64] *Id.*

[65] *Id.*

[66] Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1 (1970).

[67] Davis, *supra* note 32, at 823.

[68] *Id.* at 840.

[69] Eagly, *supra* note 3, at __ & Table 1. I relied on data from the State Criminal Alien Assistance Program (SCAAP) to identify those states with the highest levels of noncitizens

contacted, forty-two shared information regarding their noncitizen plea practices. The majority of the offices (twenty-nine) had no written office policy that mentioned immigration status or immigration consequences.

The former president of the National District Attorneys Association Robert Johnson has explained that the lack of prosecutorial collateral consequences policies is due in part to the belief that prosecutors do not "control the whole range of restrictions and punishment imposed on the offender[.]"[70] The hesitancy to consider collateral consequences also reflects the assumption that statutory penalties "fit the crime" and therefore prosecutors should only worry about the conduct, and not the result, at sentencing and beyond.

However, with increased awareness of the growing harshness of immigration consequences, attitudes about addressing collateral consequences in the context of plea negotiations have begun to change. In recent years, more prosecutor offices have adopted office-wide policies that require prosecutors to weigh immigration consequences in plea bargaining.[71] For example, the Los Angeles District Attorney's Office allows prosecutors to consider collateral consequences, including deportation, when plea bargaining on low-level felonies and misdemeanors. Under the written policy, deviation from standard settlement rules is considered to be "in the interest of justice" when "indirect or collateral consequences to the defendant in addition to the direct consequences of the conviction" constitute "unusual or extraordinary circumstances."[72]

With a policy in place that allows plea bargaining to eliminate the collateral consequence of deportation in appropriate cases, prosecutor offices can, as Heidi Altman has shown, "normalize" the practice of considering "immigration penalties," including by crafting "alternative plea offers, when appropriate, to preserve noncitizen defendants' immigration status."[73] California legislation now *requires* all state prosecutors as of January 1, 2016 to take immigration

---

in their prisons and jails. As noted earlier in this Article, under SCAAP, the federal government reimburses states for a portion of the costs associated with incarcerating criminal aliens for local criminal prosecutions.

[70] Robert M.A. Johnson, *A Prosecutor's Expanded Responsibilities Under* Padilla, __ ST. LOUIS UNIV. PUBLIC L. REV. 129 (XX), http://immigrantdefenseproject.org/wp-content/uploads/2013/11/A-Prosecutors-Expanded-Respnsibilities-Under-Padilla.pdf.

[71] *See generally* Ingrid V. Eagly, *Immigrant Protective Policies in Criminal Justice*, NEW CRIMINAL L. REV. (forthcoming 2016).

[72] Special Directive 03-04 from Steve Cooley, Dist. Attorney, L.A. Cnty., to All Deputy Dist. Attorneys (Sept. 25, 2003), http://libguides.law.ucla.edu/ immigrationandcriminaladjudication/lacounty.

[73] Heidi Altman, *Prosecuting Post*-Padilla*: State Interests and the Pursuit of Justice for Noncitizen Defendants*, 101 GEO. L.J. 1, 9 (2012).

status into account in reaching a just outcome in a case.[74] This groundbreaking new law is an important model for implementing collateral consequences policies on a statewide basis.

B. Empowering Criminal Court Judges to Exercise Immigration Mercy

Although internal prosecutorial policies requiring line deputies to consider collateral sanctions in plea bargaining offer considerable promise for curbing prosecutorial overzealousness in the immigration arena, such a solution is necessarily incomplete. It would be unrealistic to expect self-regulation to eliminate the pervasive problem of prosecutorial overreaching. Additional checks and balances are needed.

Until 1990, sentencing judges were empowered to ameliorate the immigration consequence of a conviction. Under the procedure, known as a Judicial Recommendations Against Deportation or "JRAD," immigrants could petition the criminal court judge to issue an order precluding the immigration agency from using the conviction as a basis for deportability. When such an order was granted, it was binding on the immigration agency, and the immigrant could not be deported.[75]

Judicial mercy through the granting of a JRAD was never fully implemented because most criminal defense lawyers did not know that the provision existed.[76] But, today JRADs are a thing of the past. In 1990, Congress abandoned the program.[77] As a result, only immigration judges retain the authority to grant relief from deportation, and those forms of relief have also been drastically narrowed by other legislative amendments. Thus, even minor convictions can result in automatic deportation, with no available form of relief. As a result of this and other legal and policy changes, today the rate of criminal deportations is higher than ever: 198,394 immigrants with criminal convictions were removed in 2013, compared to only 92,380 in 2004.[78]

One important solution to the "crimmigration" problem is to revive the JRAD program. Margaret Taylor and Ronald Wright have set forth a compel-

---

[74] *See* A.B. 1343, __ (2015). *See also* L.J. Williamson, *Law to Alter Plea Bargains*, DAILY JOURNAl, Dec. 10, 2015.

[75] DAN KESSELBRENNER & LORY D. ROSENBERG, IMMIGRATION LAW AND CRIMES (2015), Appendix A1, Judicial Recommendations Against Deportation Prior to November 29, 1990 (citing Velez-Lozano v. INS, 463 F.2d 1305 (D.C. Cir. 1972)).

[76] Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131 (2002).

[77] Immigration Act of 1990, Pub. L. No. 101-649, § 505, 104 Stat. 4978 (1990).

[78] U.S. Dep't of Homeland Sec., 2013 Yearbook of Immigration Statistics, tbl.41 (2014), *available at* http://www.dhs.gov/sites/default/files/publications/ois_yb_2013_0.pdf.

ling case for its resurrection, arguing that sentencing judges are well situated to make case-specific decisions regarding whether deportation ought to flow from the conviction.[79] Stephen Lee has similarly praised JRADs as "an intriguing alternative to the current prosecutor-centered" system of control over immigration.[80] Even the United States Supreme Court has spoken glowingly of the JRAD program. As the Justices explained in *Padilla*, JRADs provided a "critically important procedural protection to minimize the risk of unjust protection."[81]

When deportation is allowed to proceed without consideration of the merits of the immigrant's case, what Angela Banks terms "disproportionate deportation" may occur.[82] Allowing sentencing judges to ameliorate the harshness of the immigration law by considering factors such as length of residence, community ties, and the seriousness of the criminal offense is therefore a critical step in tempering the immigration powers of public prosecutors. In addition, such a program would make prosecutors less incentivized to use the criminal court as a venue for securing deportation. Rather than allowing deportation to follow as the automatic consequence of the prosecutor's charging and plea decisions, judges could ensure that the deportation outcome is just for that particular defendant. As William Stuntz has argued, this type of direct judicial oversight can help to ensure that punishment is "fair and proportionate given the defendant's criminal conduct."[83]

C. Expanding Access to Defense Counsel for Noncitizens

As the previous discussion demonstrated, the availability of judicial override may also help to restrain some of practices described in Part I of this chapter. Yet, the criminal justice system in the United States is built on an adversarial ideal, rather than an inquisitorial one.[84] Within this adversarial system,

---

[79] *See* Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131 (2002).

[80] Lee, *supra* note 62, at 598.

[81] *Padilla*, 130 S. Ct. at 1479.

[82] Angela M. Banks, *The Normative and Historical Cases for Proportional Deportation*, 62 EMORY L.J. 1243, 1298 (2013). *See also* Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1722-25 (2009); Michael J. Wishnie, I*mmigration Law and the Proportionality Requirement*, 2 U.C. IRVINE L. REV. 415 (2012).

[83] William J. Stuntz, *The Rise of Plea Bargaining and the Decline of the Rule of Law in* CAROL S. STEIKER, ED., CRIMINAL PROCEDURE STORIES (New York Foundation Press, 2006).

[84] As Professor Langer argues, in practice the United States criminal justice system is more of a "unique hybrid between both adversarial and inquisitorial conceptions of the criminal process[.]" Langer, *supra* note 6, at __.

defense lawyers play a pivotal role. In the context of plea bargaining, as Máximo Langer points out, defense attorneys have "the burden of persuading the prosecutor" that some alternative disposition of the case would be just and equitable.[85]

Criminal defendants unable to afford their own attorney have long enjoyed the constitutional right to the appointment of counsel in felony cases.[86] As recently as 2002, the Supreme Court affirmed that even petty offense cases can require counsel if they can expose the defendant to possible incarceration.[87] Yet, the quality of public defense in the United States is notoriously inadequate.[88] For example, Florida public defenders carry handle an astonishing 500 felonies and 2,225 misdemeanors per year.[89] A 2009 study conducted by the National Association of Criminal Defense Lawyers found that public defenders in New Orleans handled almost 19,000 cases a year, which meant that on average attorneys only spent seven minutes on each case.[90] These massive annual caseloads well exceed the maximum yearly number accepted in national guidelines for public defenders of 150 felonies or 400 misdemeanors per attorney.[91]

Given the severe underfunding that has plagued public defender offices, it is little wonder that many such offices have not yet successfully integrated *Padilla*'s mandate to provide advice on immigration consequences as part of their daily work. With underfunded immigrant defense, the prosecutorial practices described in Part I of this chapter have thrived. The complexity of immi-

---

[85] *Id.* at __.

[86] *See* Gideon v. Wainwright, 372 U.S. 335 (1963).

[87] *See* Alabama v. Shelton, 535 U.S. 654 (2002).

[88] *See generally* Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After Gideon v. Wainright*, 122 YALE L. J. (2013).

[89] Based on 2009 data. *See* Laurence A. Benner, *When Excessive Public Defender Workloads Violate the Sixth Amendment Right to Counsel Without a Showing of Prejudice*, March 2011, https://www.acslaw.org/files/BennerIB_ExcessivePD_Workloads.pdf.

[90] *See* ROBERT C. BORUCHOWITZ, MALIA N. BRINK & MAUREEN DIMINO, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 21 (2009), *available at* http://www.nacdl.org/public.nsf/defenseupdates/misdemeanor/$FILE/Report.pdf. Within states there can be dramatic inequality in the funding of public defender offices, given that funding often comes from local government revenues. *See* Beth A. Colgan & Lisa R. Pruitt, *Justice Deserts: Spatial Inequality and Local Funding of Indigent Defense*, 52 ARIZ. L. REV. 219 (2010).

[91] These guidelines were introduced in a 1973 report by the National Advisory Commission on Criminal Justice Standards and Goals. *See* NAT'L RIGHT TO COUNSEL COMM., CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (2009), *available at* http://www.constitutionalproject.org/pdf/139.pdf.

gration law has also contributed to the challenge of providing accurate and timely advice to noncitizen clients.

Nonetheless, there are two important steps that public defender offices can and should take to improve the lot of their immigrant clients. The first is to develop a plan for implementing the *Padilla* mandate. The second is to expand the proportion of office resources dedicated to misdemeanor representation.

With respect to *Padilla* implementation, some offices have already developed model programs for helping noncitizen clients achieve immigration safe case results. One successful approach is to hire immigration experts who are housed within the defender office, working side-by-side with criminal defense lawyers to advise immigrant clients. An advantage of this approach is that the immigration expert is "physically present" in the office and available to conduct trainings and work directly with clients.[92] As shown in a recent study by Andrés Dae Keun Kwon, this type of in-house, holistic representation "foster[s] a culture and practice of seamless integration of criminal and civil immigration defense."[93]

A few public defender offices with embedded immigration experts now do provide representation on immigration matters in immigration court. For example, immigration attorneys at the Bronx Defenders provide comprehensive immigration legal representation for their clients charged with crimes.[94] Such immigration services are vitally needed. As I have shown in previous work, only 14 percent of detained immigrants are represented by counsel,[95] and a mere 2 percent of immigrants obtain free legal services from a nonprofit or pro bono attorney.[96] For those detained immigrants who do not obtain counsel, removal is virtually guaranteed: 98 percent are ordered removed.[97] Moreover, after controlling for other factors that could affect case outcome, immigrants

---

[92] *See* Peter L. Markowitz, *Protocol for the Development of a Public Defender Immigration Service Plan*, IMMIGRANT DEF. PROJECT & N.Y. ST. DEF. ASS'N 1, 5 (2009), http:// immigrantdefenseproject.org/wp-content/uploads/2011/03/Protocol.pdf. *See also* Ronald F. Wright, Padilla *and the Delivery of Integrated Criminal Defense*, 58 UCLA L. REV. 1515 (2011).

[93] Andrés Dae Keun Kwon, *Defending Criminal(ized) "Aliens" After Padilla: Toward a More Holistic Public Immigration Defense in the Era of Crimmigration*, __ UCLA L. REV. __ (forthcoming 2016).

[94] *Id.*, at __. *See also* Robin Steinberg, *Heeding* Gideon's *Call in the Twenty-first Century: Holistic Defense and the New Public Defense Paradigm*, 70 WASH. & LEE L. REV. 961 (2013).

[95] Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 32 (2015).

[96] *Id.* at 27-28 & Fig. 5.

[97] *Id.* at 49-50 & Fig. 14.

with attorneys fare far better: among similarly situated removal respondents, the odds are fifteen times greater that immigrants with representation, as compared to those without, seek relief from removal, and five-and-a-half times greater that they obtain such relief .[98]

Thus, poor immigrants facing removal based on criminal convictions may be advised by their counsel that they are technically eligible for relief, but may not actually be able to secure it—that is, unless their public defenders can follow them into immigration court. An innovative project in New York City has secured city funding to do just that. Public defender offices (like the Bronx Defenders) that participate in the New York Family Unity Project provide universal representation to noncitizens who are detained and facing removal.[99] This kind of initiative will be closely studied and may serve as a model for other public defender offices seeking to expand their services for immigrants.

In addition to creative implementation of *Padilla* requiring public defender offices to devote a greater proportion of their scarce resources to defending misdemeanor cases., paying proper attention to prosecutorial overreaching with immigrants would likely have the same effect. As Irene Joe's fresh analysis reveals, public defender offices have traditionally invested the majority of their resources in handling felony cases, not low-level misdemeanors.[100] Yet, misdemeanors are massive in number and carry significant collateral penalties that wreak havoc on clients' lives. Joe advocates that public defender offices respond by "emphasizing misdemeanor representation even at the expense of felonies."[101]

The Supreme Court has long held that the Sixth Amendment does not require appointed counsel for criminal convictions not resulting in imprisonment, but only in a fine.[102] Yet, even fine-only crimes can result in a noncitizen's

---

[98] *Id.* at __.

[99] New York Immigrant Family Unity Project, http://www.vera.org/project/new-york-immigrant-family-unity-project (explaining that public defender offices—the Bronx Defenders, Brooklyn Defender Services, and the Legal Aid Society of New York—were selected to provide universal representation to immigrants).

[100] Irene Oritseweyinmi Joe, *Alternatives to Misdemeanor Neglect* (draft on file with author). *See also* Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. __ (2012) (explaining that while "serious felonies get closer to the gold standard of due process," misdemeanors suffer from underfunding and either no counsel or attorneys who can only provide "scant attention" to their clients).

[101] Joe, *supra* note 100, at __.

[102] Scott v. Illinois, 440 U.S. 367 (1979).

deportation.[103] Regardless of severity, when a case involves a noncitizen, public defenders should be involved from the beginning to provide advice regarding the possible immigration consequences flowing from a guilty plea. After *Padilla*, as Alice Clapman has persuasively argued, such representation may in fact be constitutionally required.[104]

Litigation may also play a key role in establishing a right to appointed counsel in immigration court. At the very least, as Daniel Kanstroom contends, the Sixth Amendment may require appointed counsel in crime-based deportation proceedings of "long-term permanent residents."[105] Following a landmark decision in the Ninth Circuit, immigration judges now appoint counsel for detainees with severe mental impairments.[106] An ongoing nationwide class action lawsuit alleges that the federal government is legally required to appoint counsel for all children in removal proceedings.[107]

D. Involving Immigrant Communities in Reform

Up to this point, the policy suggestions in this chapter have not harnessed the political control of popular participation to counterbalance prosecutorial power over noncitizens charged with crimes. There is perhaps cause to think that community involvement is unlikely to be a promising a solution to these ills. Public sentiment in many communities runs dangerously punitive toward immigrants, especially given the dominant narrative of the "criminal alien" popularized in the public imagination.[108] Moreover, by law, noncitizens have

---

[103] *See generally* Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 298-303 (2011) (highlighting the salience of minor misdemeanors for noncitizens).

[104] Alice Clapman, *Petty Offenses, Drastic Consequences: Toward a Sixth Amendment Right to Counsel for Noncitizen Defendants Facing Deportation*, 33 CARDOZO L. REV. 585, 606-07 (2011).

[105] Daniel Kanstroom, *The Right to Deportation Counsel in* Padilla v. Kentucky*: The Challenging Construction of the Fifth-and-a-Half Amendment*, 58 UCLA L. REV. 1461, 1514 (2011).

[106] Franco-Gonzales v. Holder, 767 F. Supp. 2d 1034 (C.D. Cal. 2010). In response to the *Franco-Gonzalez* decision, the government unveiled a new nationwide policy to appoint counsel for immigrants with serious mental disabilities. Press Release, U.S. Dep't of Justice, Department of Justice and the Department of Homeland Security Announce Safeguards for Unrepresented Immigration Detainees with Serious Mental Disorders or Conditions (Apr. 22, 2013), http://www.justice.gov/eoir/pages/attachments/ 2015/04/21/ safeguards-unrepresented-immigration-detainees.pdf, *archived at* http://perma.cc/HR36-3HET.

[107] Complaint—Class Action at 23-24, J.E.F.M. v. Holder, No. 2:14-cv-01026 (W.D. Wash. July 9, 2014).

[108] Mary Bosworth, *Border Control and the Limits of the Sovereign State*, 17 SOCIAL LEGAL STUDIES 199 (2008).

fewer rights to formally participate in the criminal justice system in ways that might right these wrongs: they cannot sit on juries nor can they vote in democratic elections for their prosecutor of choice.[109] Radical participatory approaches like jury nullification are less viable when members of the affected immigrant community themselves cannot cast their vote.[110]

Yet, immigrant communities have been successful in mounting campaigns to stop some of the worst prosecutorial abuses. One notable example is the Obama Administration's abandonment of its signature immigration enforcement program (known as "Secure Communities") after sustained community protest that the program fostered racial profiling and unjust deportations.[111]

Progressive prosecutors and public defender offices have increasingly sought to involve grassroots communities in policy matters and decisionmaking at the front end of the criminal justice system, before an arrest even takes place. These efforts to involve community aim to make the criminal justice system more participatory, more democratic, and more responsive to what is happening on the ground.[112]

For prosecutors, community engagement can mean working with local law enforcement to structure policing and enforcement strategies that address com-

---

[109] For a compelling argument that lawful permanent residents ought to be allowed to serve on criminal juries, see Amy R. Motomura, *The American Jury: Can Noncitizens Still Be Excluded?*, 64 STAN. L. REV. 1503 (2012). Influential arguments for expanded community participation in law enforcement strategies have relied explicitly on "minority involvement in the political process" through voting and running for office. Indeed, this "political power" can be used by minority communities to "take charge of the crime problems that plague their neighborhoods." Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of Chicago v. Morales*, 1988 U. CHI. LEGAL F. 197.

[110] Paul Butler, Essay, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995). *See also* Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169 (1995) (advocating that civil juries be empowered to constrain police conduct).

[111] *See* Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to Thomas S. Winkowski et al., Secure Communities (Nov. 20, 2014), *available at* http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf (announcing the end of Secure Communities and acknowledging the public criticism of the program).

[112] As David Sklansky points out, concepts of "community policing," like "community prosecution" or "community defense" remain "ill-defined." David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1701 n.17, 1778-80 (2005). The account of democratic participation in the criminal justice system that I advocate here is one rooted more in what Sklansky has described as "beginning in the 1960s" and "emphasizing popular participation, community, and deliberation." *Id.* at 1703.

munity members' concerns.[113] Further, community-oriented prosecution requires actively listening to how charging and sentencing decisions impact defendants.[114] Communities that feel the prosecutor's office is working *for* them, rather than purely as an adversary, are more likely to cooperate in criminal cases.[115] This trust can help to locate witnesses and to encourage victims to come forward.[116] Moreover, when community members perceive the criminal justice system as legitimate, they are more likely to comply with its demands and cooperate in its operation.[117]

For criminal defense attorneys, relationships with the community are also essential.[118] Trust is the most critical aspect of the lawyer-client relationship.[119] An indigent defendant who has had no knowledge of the public defender's office may see his public defender, who is paid by the state and often quite

---

[113] *See*, *e.g.*, *Key Principles of Community Prosecution*, National District Attorneys Association, 2009, at 3, *available at* http://www.ndaa.org/pdf/final_key_principles_updated_jan_2009.pdf.

[114] *Id.*, at p. 4. On active listening and the imperative of working with subordinated communities, see DAVID A. BINDER ET AL., *Chapter 3: Active Listening*, *in* LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH 40 (3d ed. 2011); Gerald P. López, *Training Future Lawyers to Work with the Politically and Socially Subordinated: Anti-Generic Legal Education*, 91 W. VA. L. REV. 305 (1989).

[115] Nik Theodore, Insecure Communities: Latino Perceptions of Police Involvement in Immigration Enforcement, May 2013, https://www.policylink.org/sites/default/files/INSECURE_COMMUNITIES_REPORT_FINAL.PDF.

[116] *See*, *e.g.*, *Community Prosecution and Serious Crime: A Guide for Prosecutors*, Bureau of Justice Assistance, 2010, at p. 6, *available at* http://www.courtinnovation.org/sites/default/files/documents/CP_SC.pdf.

[117] *See*, *e.g.*, E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 106 (1988) ("The perception that one has had an opportunity to express oneself and to have one's views considered by someone in power plays a critical role in fairness judgments."); Jonathan D. Casper et al., *Procedural Justice in Felony Cases*, 22 LAW & SOC'Y REV. 483, 503 (1988) (finding that felony defendants' evaluations of their treatment in court "do not appear to depend exclusively upon the favorability of their sentences," but are also "substantially influenced" by "their sense of fairness--in terms of both procedural and distributive justice").

[118] *See*, *e.g.*, Kim Taylor-Thompson, *Taking it to the Streets*, 29 N.Y.U. REV. L. & SOC. Change 153 (2004); *see also* Steinberg, *supra* note 94; RAISING VOICES: TAKING PUBLIC DEFENSE TO THE STREETS. BRENNAN CENTER FOR JUSTICE 1 (Nov. 4, 1987), http://www.brennancenter.org/publication/taking-public-defense-streets.

[119] Jonathan A. Rapping, *You Can't Build on Shaky Ground: Laying the Foundation for Indigent Defense Reform Through Values-Based Recruitment, Training, and Mentoring*, 3 HARV. L. & POL'Y REV. 161, 171 (2009) ("A strong attorney-client relationship will help the lawyer foster a sense of loyalty and fidelity to the client and will allow the client to develop respect and trust for the advocate.").

overworked, as either incompetent or, even worse, simply a tool of the prosecution team working to get a conviction.[120] Building a trusting relationship then becomes difficult, if not impossible. However, if the office has a relationship and connection with the community, an indigent client is much more likely to understand immediately that his public defender is working in his best interest and for best outcome possible in his case.[121] One way to form a positive relationship with the community is to host community service workshops or meetings to listen to community concerns and disseminate important information about what is happening inside the criminal justice system.[122]

A more radical participatory vision that is gaining national attention is known as "participatory defense."[123] This community organizing model seeks to involve families and communities affected by the criminal justice system in seeking fundamental change. In the words of community organizer Raj Jadadev, participatory defense seeks to challenge the "unspoken belief" that "when a case hits the judicial process," community members "couldn't effect change."[124]

Participatory defense "emphasizes equality in the generation and administration of the governing law, and pairs effective self-governance with a shrinking carceral state."[125] The model does not directly involve defense attorneys, and certainly does not invite prosecutors. Rather, it sees itself as a "horizontal space" designed to make community members "agent[s] of change themselves."[126]

This nascent participatory defense movement has built space in churches, schools, and other community spaces to support families affected by incarceration. One example of an activity taken on by participatory defense organizers is the creation of "social biography videos" that document the life history of the

---

[120] *See, e.g.*, Jonathan D. Casper, *Did You Have a Lawyer When You Went to Court? No, I Had a Public Defender*, YALE REV. L. & SOC. ACTION, Spring 1971, at 4.

[121] *See, e.g.*, Steinberg, *supra* note 94, at 997.

[122] For more on the importance of community outreach and education, see Ingrid V. Eagly, *Community Education: Creating A New Vision of Legal Services Practice*, 4 CLINICAL L. REV. 433 (1998).

[123] *See, e.g.*, Janet Moore et al., *Make Them Hear You: Participatory Defense and the Struggle for Criminal Justice Reform*, 78 ALB. L. REV. 1281 (2015). For earlier work delineating the value of popular participation in shaping the criminal justice system, see Dan M. Kahan & Tracey L. Meares, Foreword, *The Coming Crisis of Criminal Procedure*, 27 ANN. REV. CRIM. PROC. 1153 (1998).

[124] Raj Jayadev, *The Story of Participatory Defense*, *available at* http://www. siliconvalleydebug.org/ articles/2015/05/22/story-participatory-defense.

[125] Moore et al., *supra* note 123, at 1282.

[126] Jayadev, *supra* note 124.

person facing criminal charges and have successfully helped to improve outcomes in criminal cases, including to persuade judges to release a defendant on bond, to convince a prosecutor to offer a favorable plea, or to show the judge why a more lenient sentence is warranted.[127] Another powerful example comes from the ongoing community organizing in Ferguson, Missouri, where Michael Brown, Jr. was tragically shot by police.[128] Chanting "the people united, will never be defeated," community members recently occupied the steps of the Ferguson, Missouri courthouse to demand an end to police violence and other criminal justice reforms.[129] Importantly, these protests brought community organizers and residents to the *courthouse*—a space that has traditionally been one for prosecutors, defense lawyers, and "clients," transforming it into a space where community members themselves seek change on their own terms.

CONCLUSION

In conclusion, this chapter has argued that the criminal justice system should treat all defendants equally, according to universal membership rules that do not delineate between citizens and noncitizens. Achieving this equality requires a multi-pronged approach to decouple criminal prosecution from punitive reliance on the membership rules of the immigration system. Guidelines for prosecutors are a start, but it is also important to enhance the supervisory authority of judges and to fund public defenders to do their jobs well. Finally, immigrant communities themselves must be involved in the struggle to craft a criminal justice system committed to the norms of democratic participation and equal citizenship.

---

[127] Moore et al., *supra* note 123, at __.

[128] As documented in a scathing report by the Department of Justice, such fines are disproportionately levied on black residents and stem from "unlawful bias." UNITED STATES DEPARTMENT OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT, __, March 4, 2015.

[129] Amanda Sakuma & Trymaine Lee, *Police Arrest Protestors Outside St. Louis Courthouse*, MSNBC, Aug. 10, 2015.