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Illegal Entry as Crime, Deportation as Punishment: Immigration Status and the Criminal Process

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ILLEGAL ENTRY AS CRIME, DEPORTATION AS PUNISHMENT: IMMIGRATION STATUS AND THE CRIMINAL PROCESS

Gabriel J. Chin*

In Padilla v. Kentucky, *the U.S. Supreme Court held that the Sixth Amendment required counsel to advise clients pleading guilty that conviction might result in deportation. The Court rested its decision on the idea that this information was important to the client's decisionmaking process. However, the Court did not explore a stronger reason for developing a more precise understanding of a client's immigration status: namely, the effect of that status on ordinary criminal prosecutions, such as burglary or assault. This Article proposes that under current law, immigration status can have substantial effects on the criminal prosecution and sentencing of noncitizens for ordinary nonimmigration crimes.*

This Article examines the position of noncitizens in the United States. For some noncitizens, particularly those without legal status, courts treat unlawful entry or removability as a quasi-crime, negatively affecting the case in ways similar to the effect of a prior criminal conviction. For other noncitizens, particularly but not exclusively those with legal status, the possibility of deportation is treated as a quasi-punishment, which sometimes mitigates other punishments or affects charging decisions if deportation or the overall package of sanctions would be too harsh. This Article proposes that it is consistent both with fairness to all individuals in the United States and with widely accepted principles of criminal justice to consider—carefully—immigration status in the criminal process.

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INTRODUCTION

In *Padilla v. Kentucky*,[1] the U.S. Supreme Court held that the Sixth Amendment required defense counsel to advise their clients about the possibility of deportation. In so doing, it overruled dozens of state supreme court and U.S. Court of Appeals decisions. The Court concluded that although deportation was "not, in a strict sense, a criminal sanction," it was "intimately related to the criminal process"[2] because deportation could follow automatically from conviction. In addition, the Court recognized that deportation was important to the decisionmaking of clients who are considering pleas.

The Court's decision rested on the idea that clients had the right to know what would happen to them if they were to pursue a particular course of action. *Padilla*'s irresistible implication is that lawyers must warn their clients about other collateral consequences similar to deportation.[3] This alone makes *Padilla* one of the most significant Court decisions in the twenty-first century; Justice Alito, concurring in the judgment, rightly called *Padilla* a "major upheaval in Sixth Amendment law."[4]

Nevertheless, the Justices had a fairly narrow understanding of the connection between immigration status and criminal prosecutions. Justice

1. 130 S. Ct. 1473 (2010).
2. *Id.* at 1481.
3. *See id.* at 1491 (Alito, J., concurring in the judgment) ("[I]f defense counsel must provide advice regarding only one of the many collateral consequences of a criminal conviction, many defendants are likely to be misled."); *id.* at 1496 (Scalia, J., dissenting) ("[T]he '*Padilla* Warning'—cannot be limited to [immigration] consequences except by judicial caprice.").
4. *Id.* at 1491 (Alito, J., concurring in the judgment).

Stevens's majority opinion concluded that when the immigration consequences were clear, a defendant had to be advised about the specific consequences, but "[w]hen the law is not succinct and straightforward[,] . . . a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences."[5] That is, the Court assumed that it was unnecessary to determine a client's precise immigration status in every case.

Chief Justice Roberts and Justices Scalia, Thomas, and Alito did not even go that far. Justice Alito, concurring in the judgment for himself and for the Chief Justice, concluded that only a general warning of possible deportation was constitutionally required, noting that "a criminal defense attorney should not be required to provide advice on immigration law, a complex specialty that generally lies outside the scope of a criminal defense attorney's expertise."[6] He believed that the simple function of advice about immigration status was to allow a defendant to accept or reject a plea. Justice Scalia's dissent for himself and for Justice Thomas strenuously argued that the Sixth Amendment was limited to "those matters germane to the criminal prosecution at hand—to wit, the sentence that the plea will produce, the higher sentence that conviction after trial might entail, and the chances of such a conviction."[7]

While the Justices differed on whether counsel had a duty to inform the client about immigration effects, all nine agreed that immigration status and the criminal case were largely functionally distinct.[8]

Many scholars, however, recognize the connections between immigration and the criminal justice system, such as immigration law making criminal conviction grounds for deportation.[9] Much has also been written—mostly critical—about the increasing use of federal criminal prosecutions[10] and

5. *Id.* at 1483 (majority opinion).

6. *Id.* at 1494 (Alito, J., concurring in the judgment).

7. *Id.* at 1495 (Scalia, J., dissenting).

8. In this, they followed preexisting law. *See, e.g.*, United States v. Amador-Leal, 276 F.3d 511, 516 (9th Cir. 2002) ("[D]eportation [is] a 'purely civil action' separate and distinct from a criminal proceeding." (quoting INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984))); *see also* Villafuerte v. INS, 235 F. Supp. 2d 758, 761 (N.D. Ohio 2002) ("Deportation of an alien is a civil proceeding separate and independent from the criminal proceeding."); State v. Montalban, 810 So. 2d 1106, 1109 (La. 2002); Commonwealth v. Taivero, No. CR-06-0037-GA, 2009 WL 2461664, at *4 (N. Mar. I. Aug. 7, 2009).

9. *See, e.g.*, Joanne Gottesman, *Avoiding the "Secret Sentence": A Model for Ensuring That New Jersey Criminal Defendants Are Advised About Immigration Consequences Before Entering Guilty Pleas*, 33 SETON HALL LEGIS. J. 357 (2009); Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683 (2009); Jeff Yates, Todd Collins & Gabriel J. Chin, *A War on Drugs or a War on Immigrants? Expanding the Definition of "Drug Trafficking" in Determining Aggravated Felon Status for Non-Citizens*, 64 MD. L. REV. 875 (2005).

10. *See, e.g.*, Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281 (2010); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice*

local authorities[11] to enforce immigration policy.[12] However, with regard to ordinary, nonimmigration criminal prosecution of noncitizens, scholars and courts agree—normatively, descriptively, or both—that the criminal justice system and immigration status are separate.

This Article proposes that the *Padilla* Court and scholars who have examined the relationship between crime and immigration have overlooked an important connection. Courts and legislatures have made alienage and a person's immigration status—whether a defendant is a citizen of another nation, has permanent residency (a "green card") or some other visa, or entered the United States in violation of law—a pervasively important factor in almost every aspect of a criminal case. Far from being "separate and independent from the criminal proceeding,"[13] deportation and other aspects of immigration status are often key considerations in the disposition of a criminal case. Immigration status affects the proceedings from bail through execution of a sentence. Noncitizens represent over 10 percent of the United States population and have a similar share of the prison population, so rules applicable only to noncitizens have potentially substantial effects.[14]

Norms, 64 WASH. & LEE L. REV. 469 (2007); Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289 (2008); Maria Isabel Medina, *The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud*, 5 GEO. MASON L. REV. 669 (1997).

11. One branch of this literature focuses on use of state and local law enforcement to carry out immigration policy. *See, e.g.*, David A. Harris, *The War on Terror, Local Police, and Immigration Enforcement: A Curious Tale of Police Power in Post–9/11 America*, 38 RUTGERS L.J. 1 (2006); Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime Control After September 11th*, 25 B.C. THIRD WORLD L.J. 81 (2005); Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373 (2006); Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power Over Immigration*, 86 N.C. L. REV. 1557 (2008); Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084 (2004); *see also Public Safety and Civil Rights Implications of State and Local Enforcement of Federal Immigration Laws: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Sec., and Int'l Law and the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. (2009) (testimony of David Harris, Professor of Law, University of Pittsburgh), *available at* http://judiciary.house.gov/hearings/pdf/Harris090402.pdf. In addition, there is work focusing on state and local civil enforcement of immigration policy. *See, e.g.*, Huyen Pham, *The Private Enforcement of Immigration Laws*, 96 GEO. L.J. 777 (2008).

12. *But cf.* Peter Spiro, *Learning to Live With Immigration Federalism*, 29 CONN. L. REV. 1627 (1997).

13. *Lopez-Mendoza*, 468 U.S. at 1038.

14. Immigrants are not randomly distributed across the country. The ten states with the largest number of immigrants in absolute terms, in order, are California, New York, Florida, Texas, New Jersey, Illinois, Georgia, Massachusetts, Arizona, and Virginia. STEVEN A. CAMAROTA, CTR. FOR IMMIGRATION STUDIES, IMMIGRANTS IN THE UNITED STATES, 2007: A PROFILE OF AMERICA'S FOREIGN-BORN POPULATION 6 (2007), *available at* http://www.cis.org/articles/2007/back1007.pdf. They repre-sent over two-thirds of the national immigrant population. The top four states represent

The effects of immigration status on criminal cases can roughly be divided into two categories: imposing disadvantages, often but not exclusively, on those without legal status, and offering charging or sentencing consideration, often but not exclusively, to those with legal status. As described in Part I, a series of doctrines treat undocumented or deportable noncitizens less favorably than citizens or, in many instances, than lawful permanent residents. Functionally, these rules treat individuals who entered unlawfully as if they committed a crime but were not convicted; that is, unlawful entry is treated as a quasi-crime. Statutes and court decisions provide that undocumented status may be a basis for denying bail, which can adversely affect the outcome of the case.[15] In addition, under principles of evidence law, those who entered the United States without legal authorization may be impeached on the ground that their conduct indicates dishonesty or that they are biased.[16] Individuals convicted of a crime who are undocumented or removable may, for that reason, be denied an otherwise available sentence of probation or some other nonprison alternative.[17] A number of jurisdictions make undocumented status an aggravating circumstance that may result in a higher sentence.[18]

Another broad category of effects, as described in Part II, is the advantages to noncitizens who are charged with crimes. Recognizing the significance of deporting those with meaningful ties to the United States, a number of practices make it possible, in some cases, to avoid deportation altogether or to receive a reduced sentence in recognition of the grievous loss of deportation.[19] This means that if a noncitizen and a citizen with identical records commit a crime together with the same level of culpability, the noncitizen might serve less prison time by being released early for deportation or might receive a lower sentence in the first instance in order to avoid deportation.

As they now exist, these legal doctrines show the importance not only of counsel's understanding of the possibility that her client might be deported, but also of her awareness of her client's precise immigration status. This means that providing competent representation under the existing legal system requires counsel to be more attentive to her client's immigration situation than any member of the *Padilla* Court recognized.

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nearly half of the immigrant population. *Id.* at 7. Accordingly, the criminal justice policies of these states are disproportionately representative of U.S. policy towards noncitizens.

15. *See infra* notes 22–48 and accompanying text.
16. *See infra* notes 49–68 and accompanying text.
17. *See infra* notes 69–78 and accompanying text.
18. *See infra* notes 79–93 and accompanying text.
19. *See infra* notes 94–150 and accompanying text.

The connections raise the question of whether the links between immigration and the criminal process are legitimate and desirable. Some or all of the doctrines making immigration status relevant to the criminal case could be eliminated or changed if, as a matter of principle, immigration status should be separated from the criminal justice system.

Part III explores the complex question of the normative desirability of considering immigration status both for and against a noncitizen.[20] It concludes that many doctrines making immigration status relevant are consistent with general principles of criminal law and policy. The doctrines also contain the potential to unfairly disadvantage noncitizens, and therefore one possible approach would be to separate, as much as possible, the criminal justice system from the immigration system. However, because many of these doctrines directly advantage noncitizens, a rule of strict irrelevance would impose hardship on many people. Even some of the provisions imposing burdens, such as the impeachment rule, are not simple to evaluate. For example, impeaching undocumented noncitizen witnesses for the prosecution will often help documented or undocumented noncitizen defendants. Part III proposes that doctrines adversely affecting defendants based on immigration status or circumstances of entry be reformed and more carefully applied, but that, on balance, they are warranted in some cases.

Part III also explores the merits of allowing early release or other consideration to noncitizens who are facing criminal charges.[21] It proposes that even though deportation is not "punishment" for constitutional purposes, it is consistent with principles of punishment and sentencing and should be considered a quasi-punishment. If deportation and the other set of sanctions imposed as part of the criminal sentence would together be an excessive sanction, then a prosecutor or court may justly mitigate the overall package of punishment. This would help make sanctions consistent between those who will be deported as a result of conduct and those who will not.

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20. *See infra* notes 151–197 and accompanying text. The most fundamental question of whether noncitizens convicted of a crime should, for that reason, be deportable, is not addressed at length here for two reasons. First, some, including the author, believe that noncitizens are too freely removed from the United States for relatively minor offenses. *See, e.g.*, ABA CRIMINAL JUSTICE SECTION COMM'N ON IMMIGRATION, *Recommendation 300 (06M300)*, adopted by the House of Delegates in 2006, *available at* http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_policy_my06300.authcheckdam.pdf (proposing limits on deportation). However, deportation for crime is currently an entrenched feature of federal law. Second, this Article is aimed in large part at criminal prosecutors, defenders, courts, and state legislatures structuring criminal justice systems. These actors do not generally have control over the substance of deportation law. Accordingly, the continuing existence of criminal deportation is assumed.

21. *See infra* notes 198–234 and accompanying text.

On balance, this Article concludes that it is more likely to promote justice to acknowledge, structure, and reform, rather than to absolutely eliminate, the connection between immigration and criminal justice.

I. DISADVANTAGES FOR NONCITIZENS

A criminal defendant's immigration status can lead to a series of negative consequences throughout the criminal case, particularly if the defendant is removable. Such consequences include denial of bail, the possibility of impeachment if a defendant testifies, ineligibility for nonprison sentences, and the use of unlawful entry as an aggravating factor at sentencing.

A. Denial of Bail

Many jurisdictions consider a defendant's alienage in setting bail. These jurisdictions generally but not exclusively focus on undocumented noncitizens. While the Federal Bail Reform Act[22] allows up to ten days detention of noncitizens who are not lawful permanent residents to allow the immigration authorities time to act, it does not otherwise distinguish between citizens and noncitizens.[23]

The Arizona Constitution offers the most extreme approach, absolutely denying bail to certain noncitizens charged with serious crimes.[24] Missouri[25] and Virginia[26] have statutory presumptions that undocumented noncitizens should not be released on bail. South Carolina law makes undocumented status a bail factor.[27] An Illinois statute listing bail factors allows courts to consider that the defendant is undocumented, deportable or excludable, or is

22. 18 U.S.C § 3140 (1984).

23. *Id.* § 3142(d)(1)(B).

24. ARIZ. CONST. art. 2, § 22(A)(4) (denying bail for "serious felony offenses" if the defendant has "entered or remained in the United States illegally and if the proof is evident or the presumption great as to the present charge"); *see also* Segura v. Cunanan, 196 P.3d 831 (Ariz. Ct. App. 2008) (discussing the unavailability of bail to certain categories of noncitizens).

25. MO. ANN. STAT. § 544.470(2) (West Supp. 2010) ("There shall be a presumption that releasing the person under any conditions . . . shall not reasonably assure the appearance of the person as required if the . . . judge reasonably believes that the person is an alien unlawfully present in the United States.").

26. VA. CODE ANN. § 19.2-120.1(A) (2008) ("[T]he judicial officer shall presume, subject to rebuttal, that no condition or combination of conditions will reasonably assure the appearance of the person or the safety of the public if (i) the person is currently charged with [one of several specified offenses], and (ii) the person has been identified as being illegally present in the United States by the United States Immigration and Customs Enforcement.").

27. S.C. CODE ANN. § 17-15-30(B)(4) (Supp. 2010) (considering as a bail factor "whether the accused is an alien unlawfully present in the United States, and poses a substantial flight risk due to this status").

a dual citizen if her other country of citizenship will not extradite her back to the United States.[28]

Other jurisdictions uphold consideration of alienage as a bail factor by case law, including California,[29] Florida,[30] Georgia,[31] Kentucky,[32] New Jersey,[33] New York,[34] Ohio,[35] Texas,[36] and the federal courts.[37]

Research has uncovered no statutes or cases prohibiting consideration of immigration status as a factor in setting bail, at least to the extent that it would be relevant to the risk of flight or the nature of community ties. If "the object of bail in criminal cases is to secure the appearance of the principal before the court for the purposes of public justice[,]"[38] accounting for noncitizen status is logical in some circumstances given that a noncitizen without legal status faces the possibility of deportation regardless of the outcome of the criminal action.

The risk of not appearing at trial arises from two sources. First, if conviction of a crime will result in deportation, some defendants might prefer immediate departure to departure after a term of imprisonment. Second,

28. 725 ILL. COMP. STAT. ANN. 5/110-5(a) (West 2006 & Supp. 2011) (allowing courts to consider whether a noncitizen "is lawfully admitted," whether the country of citizenship "maintains an extradition treaty with the United States," "whether the defendant is currently subject to deportation or exclusion," and whether a citizen-defendant "is considered under the law of any foreign state a national of that state for the purposes of extradition or nonextradition to the United States").

29. *See* Van Atta v. Scott, 613 P.2d 210, 216 (Cal. 1980) (considering "immigration status" as part of the "detainee's ties to the community").

30. *See* Santos v. Garrison, 691 So. 2d 1172 (Fla. Dist. Ct. App. 1997) (holding that a bond could not be revoked sua sponte simply because the defendant was undocumented but that on remand the court could consider it if it were not known at the initial bail hearing); Flores v. Cocalis, 453 So. 2d 1198, 1199 (Fla. Dist. Ct. App. 1984) (upholding a high bond for noncitizens, and noting that "[a]mong the factors that the trial court could consider was that Flores" was "a citizen of Honduras").

31. *See* Hernandez v. State, 669 S.E.2d 434, 435 (Ga. Ct. App. 2008) (upholding $1,000,000 bail because "Hernandez's counsel conceded that Hernandez is not a United States citizen, and Hernandez presented no evidence that he was in this country legally").

32. *See* Commonwealth v. Padilla, 253 S.W.3d 482, 483 (Ky. 2008), *rev'd*, 130 S. Ct. 1473 (2010).

33. *See* State v. Fajardo-Santos, 973 A.2d 933, 939 (N.J. 2009) ("When bail is set, it is entirely appropriate to consider a defendant's immigration status in evaluating the risk of flight or nonappearance.").

34. *See* People *ex rel.* Morales v. Warden, 561 N.Y.S.2d 587 (App. Div. 1990).

35. *See* Blackwood v. McFaul, 730 N.E.2d 452, 454 (Ohio Ct. App. 1999) ("Petitioner . . . is not a citizen of the United States.").

36. *See Ex parte* Rodriguez, No. 01-03-00550-CR, 2004 WL 1234001 (Tex. Ct. App. June 1, 2004).

37. *See* United States v. Townsend, 897 F.2d 989, 995–96 (9th Cir. 1990); United States v. Motamedi, 767 F.2d 1403, 1408 (9th Cir. 1985) ("[T]he factor of alienage . . . may be taken into account . . . ." (citing Truong Dinh Hung v. United States, 439 U.S. 1326, 1329 (1978) (Brennan, Circuit Justice))).

38. United States v. Ryder, 110 U.S. 729, 736 (1884); *see also, e.g.*, Stack v. Boyle, 342 U.S. 1, 5 (1951) ("Bail set at a figure higher than an amount reasonably calculated [to ensure the defendant's presence at trial] is 'excessive' under the Eighth Amendment."). *But cf.* United States v. Salerno, 481 U.S. 739 (1987) (upholding preventative detention under some circumstances).

under the Immigration and Nationality Act, a removable noncitizen remains removable even if she is charged with a state criminal offense.[39] Thus, if a noncitizen is deportable without regard to the outcome of the criminal case, the state must ordinarily keep her in custody or otherwise prevent her departure from the United States.[40] After deportation or voluntary departure, it may well be impossible to try or to incarcerate the individual.[41]

The situation is different with noncitizens having or seeking a legal basis to remain in the United States, many of whom have an incentive both to comply with release requirements and to avoid conviction. On the other hand, a noncitizen, dual citizen, or even a citizen with foreign contacts might be tempted to abscond when faced with serious charges, à la Marc Rich or Robert Vesco, both of whom fled the United States to avoid prosecution.[42] In *Truong Dinh Hung v. United States*,[43] Justice Brennan as Circuit Justice considered an application for bail pending appeal to a noncitizen convicted of espionage. Justice Brennan recognized that close ties to the home country "suggest opportunities for flight."[44]

Whether resulting in automatic bail ineligibility or merely being one of a number of factors, consideration of immigration status will result in detention of more undocumented noncitizens (through denial of bail or setting of a bail amount that the defendant is unable to make). This increases the chances of conviction. As one scholar explained:

> The question of bail is not just a matter of being able to remain at liberty . . . until one's trial is concluded, it also has a fundamental effect on the ultimate outcome of one's criminal case. One study

39. *See* 8 U.S.C. § 1231(a)(4)(A) (2006) ("[T]he Attorney General may not remove an alien who is sentenced to imprisonment until the alien is released from imprisonment. Parole, supervised release, probation, or possibility of arrest or further imprisonment is not a reason to defer removal."); *see also* State *ex rel.* Thomas v. Blakey, 118 P.3d 639 (Ariz. Ct. App. 2005).

40. However, a federal regulation allows state prosecutors to seek to prevent the departure from the United States of a person needed as a party or witness in a criminal proceeding. *See* 8 C.F.R. § 215.3(g) (2010).

41. In absentia trials of individuals who have left the United States may be possible. *See Blakey*, 118 P.3d 639 (allowing an in absentia trial where the defendant accepted voluntary departure in the context of removal proceedings). However, they are undesirable, both because the conviction is inevitably suspect (because the defendant did not participate) and because, if there is a conviction, no sentence can be carried out. *See* Lucas Tassara, *Trial in Absentia: Rescuing the "Public Necessity" Requirement to Proceed With a Trial in the Defendant's Absence*, 12 BARRY L. REV. 153 (2009).

42. *See generally* DANIEL AMMANN, THE KING OF OIL: THE SECRET LIVES OF MARC RICH (2009); ARTHUR HERZOG, VESCO: FROM WALL STREET TO CASTRO'S CUBA: THE RISE, FALL, AND EXILE OF THE KING OF WHITE COLLAR CRIME (1987).

43. 439 U.S. 1326 (1978) (Brennan, Circuit Justice).

44. *Id.* at 1329. He granted bail on the whole record, including affidavits of good character from Noam Chomsky, Ramsey Clark, medicine Nobelist George Wald, and Princeton international law professor Richard Falk. *Id.* at 1329 n.6.

> found that defendants who are incarcerated . . . are 35% more likely to be convicted than those who are not—if the defendant is facing a felony charge, he is 70% more likely to be convicted if he is in jail before trial . . . .[45]

The cause of the disparity between the detained and the released is not entirely clear. Because strength of the evidence is a bail factor,[46] denial of bail likely correlates with conviction and sentence in part because it correlates with strong cases. However, incarceration might systematically lead to less favorable outcomes independent of guilt.[47] First, those in jail might feel pressure to take a plea, particularly if it is a plea to probation or a plea to time served. Second, those who are released wait longer for trial[48] and it is often thought that delay favors defendants because memories fade and witnesses disappear or become less credible by, for example, being convicted of a crime for which they can be impeached. Third, it is more difficult for detained individuals to meet with their attorneys and to assist in developing evidence. Fourth, they cannot work to earn money to pay for counsel or to settle with a victim and cannot engage in rehabilitative or community service activities that would impress a prosecutor or sentencing court.

B. Impeachment of Undocumented Noncitizen Witnesses[49]

In the federal system and in other jurisdictions following the Federal Rules of Evidence,[50] unlawful entry or removable immigration status can be

45. Ric Simmons, *Private Criminal Justice*, 42 WAKE FOREST L. REV. 911, 984–85 (2007) (citing Joseph L. Lester, *Presumed Innocent, Feared Dangerous: The Eighth Amendment's Right to Bail*, 32 N. KY. L. REV. 1, 50 (2005)).

46. *See, e.g.*, 18 U.S.C. § 1341(g)(2) (2006).

47. Robert M. Hill, Jr., *Bail and Recognizance in Alabama: Some Suggested Reforms*, 21 ALA. L. REV. 601, 611 (1969).

48. *See, e.g.*, CAL. PENAL CODE § 1048(a) (West 2008) (establishing first priority for trials as felony cases "when the defendant is in custody," then in-custody misdemeanors, then felonies "when the defendant is on bail").

49. This Subpart is informed by Caleb E. Mason, *The Use of Immigration Status in Cross-Examination of Witnesses: Scope, Limits, Objections*, 33 AM. J. TRIAL ADVOC. 549 (2010), which Professor Mason generously shared in draft form.

50. Some courts refusing to allow impeachment based on illegal entry into the United States do so based on local law. Thus, an Illinois court held that there was no right to impeach based on a prior criminal act unless there had been a conviction for that act. People v. Boulrece, 552 N.E.2d 1166, 1170 (Ill. App. Ct. 1990); *see also* GA. CODE ANN. § 24-9-84(4) (2010) (precluding inquiry into specific instances of conduct); TXI Transp. Co. v. Hughes, 306 S.W.3d 230, 244 (Tex. 2010) (decided under TEX. R. EVID. 608(b), which provides: "Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness'[s] credibility, other than conviction of crime as provided in Rule 609, may not be inquired into on cross-examination of the witness nor proved by extrinsic evidence."). *But see infra* note 56 (listing subsequent Illinois cases allowing impeachment for undocumented status based on bias).

used to impeach the credibility of a witness, including a witness who is a defendant.[51] Of course, witnesses subject to impeachment on a matter that might negatively influence a jury might well choose not to take the stand, thereby foregoing helpful testimony, which increases their likelihood of conviction. If a defendant testifies and is impeached with the fact that she entered the United States unlawfully, there is an inevitable risk that a jury will not consider the conduct simply as it affects credibility, but will convict the defendant based on prejudice against undocumented noncitizens.[52]

Some aspects of the problem of impeachment are not difficult. Merely not being a U.S. citizen is not grounds for impeachment because it does not suggest untruthfulness.[53] Also, parties are entitled to cross-examine a witness to determine whether she actually received a specific benefit for testifying[54] or whether she was actually convicted of a felony, such as an immigration offense.[55]

More complicated is impeachment based on undocumented status or illegal entry alone. Courts advance two grounds for impeachment of a witness based on entry or status: bias and prior bad act. Illinois decisions allow the impeachment of undocumented prosecution witnesses because such witnesses, even without an existing threat or promise, are motivated to curry favor with authorities.[56] Potential gains for undocumented prosecution witnesses are real; no fewer than three visa categories are potentially available to witnesses or victims in federal and state criminal cases,[57] and immigration authorities are

51. *See* Colin Miller, *Crossing Over: Why Attorneys (and Judges) Should Not Be Able to Cross-Examine Witnesses Regarding Their Immigration Statuses for Impeachment Purposes*, 104 NW. U. L. REV. COLLOQUY 290 (2010).

52. There is reason to doubt that juries follow limiting or curative instructions. *See, e.g.*, Sharon Wolf & David A. Montgomery, *Effects of Inadmissible Evidence and Level of Judicial Admonishment to Disregard on the Judgments of Mock Jurors*, 7 J. APPLIED SOC. PSYCHOL. 205 (1977).

53. *See* United States v. Guerra, 113 F.3d 809, 815 (8th Cir. 1997) (concluding that alienage per se is irrelevant in a drug case); Figeroa v. INS, 886 F.2d 76, 79 (4th Cir. 1989) ("[T]he BIA offered no reason whatsoever for disbelieving Figeroa. They apparently found he lacked credibility for the simple reason that he was an illegal alien who wished to remain in this country. An individual's status as an alien, legal or otherwise, however, does not entitle the Board to brand him a liar.").

54. *See* United States v. Herrera-Medina, 853 F.2d 564, 566 (7th Cir. 1988) (finding a specific benefit to prosecution witnesses from the government: nondeportation); United States v. Valenzuela, No. CR 07-00011 MMM, 2009 WL 2095995 (C.D. Cal. July 14, 2009).

55. *See* FED. R. EVID. 609; State v. Cathey, 493 So. 2d 842, 852–53 (La. Ct. App. 1986).

56. People v. Turcios, 593 N.E.2d 907, 919 (Ill. App. Ct. 1992) ("An illegal alien might be vulnerable to pressure, real or imagined from the authorities. Thus, a defendant can present the residency status of the State's witness and argue bias if the witness was in fact an illegal alien." (citing People v. Austin, 463 N.E.2d 444 (Ill. App. Ct. 1984))); *see also* People v. Clamuextle, 626 N.E.2d 741, 746–47 (Ill. App. Ct. 1994).

57. S visas are available to witnesses and informants. Immigration and Nationality Act § 101(a)(15)(S), 8 U.S.C. § 1101(a)(15)(S) (2006). T visas are available to people who have been trafficked and their families. *Id.* § 101(a)(15)(T). U visas are available to victims of certain crimes and

not obligated to initiate proceedings against those unlawfully present.[58] Accordingly, undocumented government witnesses have reason for hope as well as fear as a result of their interactions with prosecutors and police in criminal cases. One California court permitted impeachment of defense witnesses who might testify favorably to avoid being reported to immigration authorities by the defendant.[59] With proper foundation, this might be a reasonable basis for impeachment. However, bias cannot be a reason to impeach a defendant; that is, a defendant cannot be accused of shaping his testimony to avoid deportation. Among other reasons, the motivation of the defendant to offer exculpatory testimony is clear in every case without such impeachment.

An alternative rationale, potentially applicable to any witness—including a defendant—is that illegal entry into the United States constitutes a bad act. Federal Rule of Evidence 608(b) provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness.

The critical question is whether entering the country without authorization is a bad act probative of dishonesty.[60] The doctrinal answer in many

their families. *Id.* § 101(a)(15)(U). State as well as federal law enforcement agencies can help obtain these visas. *See* 8 C.F.R. § 214.14 (2010); Julie E. Dinnerstein, *The Not So New but Still Exciting U*, 201 PLI/NY 275 (2010). A recent news article reports that some New Yorkers were charged with falsely claiming to be victims of domestic violence in order to obtain cheaper housing. Al Baker, *6 Posed as Abuse Victims to Get Rent Subsidies, Officials Say*, N.Y. TIMES, Oct. 21, 2009, at A26, *available at* http://www.nytimes.com/2009/10/21/nyregion/21housing.html. If people would lie to get cheaper rent, they might do so as well for the much more valuable right to live in the United States.

58. In addition to simply not bringing charges, immigration authorities may grant formal "deferred action" status when they decline to initiate proceedings against someone who they believe to be deportable. Those with deferred action may be authorized to work. 8 C.F.R. § 274a.12(c)(14).

59. People v. Viniegra, 181 Cal. Rptr. 848, 850 (Ct. App. 1982) ("In an attempt to impeach him for motive and bias, the prosecution on cross-examination developed that the witness was an illegal alien and that he worked at the same place as defendant's husband. The question was then asked if he was not testifying for defendant in fear that he would otherwise be 'turned in as an illegal alien . . . .'"). Several scholars have noted that undocumented workers who report illegal conduct by their employers risk being reported to immigration authorities and deported. *See, e.g.*, Kathleen Kim, *The Trafficked Worker as Private Attorney General: A Model for Enforcing the Civil Rights of Undocumented Workers*, 1 U. CHI. LEGAL F. 247, 305–06 (2009); Stephen Lee, *Private Immigration Screening in the Workplace*, 61 STAN. L. REV. 1103, 1120 (2009) ("[R]eporting and the threat of reporting effectively neutralize the ability of unauthorized workers to make this protection meaningful.").

60. Caleb Mason's work analogizes illegal entry into the United States to the crime of theft, which can be committed through deception (which clearly goes to credibility) or without any misstatements or falsehoods (which does not necessarily go to credibility). Mason, *supra* note 49, at

jurisdictions seems to be that it can be. In holding that the defense was entitled to cross-examine prosecution witnesses on their immigration status, a Bronx, New York, trial court explained that "the act of entering this country illegally or of maintaining illegal residence here is fraudulent, and the defendants should not be prevented from inquiring as to 'any immoral, vicious or criminal act which may reflect upon [the complainant's] character and show him to be unworthy of belief.'"[61] Many other cases allow impeachment because the witness entered the country unlawfully.[62] Another group of cases alludes to such impeachment without implying that it is objectionable.[63] Cases recognize that such impeachment, like other aspects of cross-examination, is subject to limitation in the trial court's discretion;[64] a few

559–60 & n.42. The state cases are divided on this question. *Compare* State v. Fields, 730 N.W.2d 777, 783 (Minn. 2007) ("[E]vidence of commission of a theft, while not directly involving false statement or dishonesty, may be admitted in the discretion of the district court as evidence of truthfulness or untruthfulness."), *with* State v. Bashaw, 785 A.2d 897, 899–900 (N.H. 2001) (holding that theft is not probative of truthfulness).

61. People v. Gonzalez, 748 N.Y.S.2d 233, 234 (Sup. Ct. 2002).

62. *See* Toliver v. Hulick, 470 F.3d 1204, 1207 (7th Cir. 2006) (noting that the defendant should have been allowed to cross-examine on immigration status, but holding that this was not a basis for habeas corpus); *id.* ("If he had said he was an illegal immigrant, then his status would have been out in the open and could have been used to impeach his credibility. There seems little legitimate reason to have restricted the inquiry . . . ."); People v. Bravo, 546 N.Y.S.2d 892, 893 (App. Div. 1989) ("[T]he court properly permitted the People to cross-examine the defendant as to his illegal entries into the United States."); *Gonzalez*, 748 N.Y.S.2d at 234; Marquez v. State, 941 P.2d 22, 26 (Wyo. 1997) ("Appellant failed to object at the trial to the testimony about his illegal alien status and his use of a false social security number. Even had he properly objected, allowing the colloquy for purposes of impeachment would have been within the trial court's discretion since the testimony was probative of Appellant's character for truthfulness."); *see also In re* Estate of Herbert, 979 P.2d 39, 61 (Haw. 1999).

63. *See* United States v. Tzeuton, 370 F. App'x 415, 420 (4th Cir. 2010) ("Finally, the value of Kabangu's testimony to the defense would be questionable because, if he did testify, the prosecution would have undoubtedly impeached [him] with . . . his possible status as an illegal alien."); United States v. Montes, 116 F. App'x 105, 107 (9th Cir. 2004); Pareja v. State, 673 S.E.2d 343, 347–48 (Ga. Ct. App. 2009) (assuming impeachment was permissible but did not constitute ineffective assistance of counsel not to pursue it on facts); State v. McPhaul, No. COA05-1053, 628 S.E.2d 260, 2006 WL 997743, at *5–6 (N.C. Ct. App. Apr. 18, 2006) (holding that the prosecution's closing argument was not error, and noting that defense attorneys cross-examined on "illegal alien" status of prosecution witnesses); State v. Tutt, 622 A.2d 459, 463 (R.I. 1993) (holding limitation on other aspects of cross-examination proper where defense counsel was allowed to elicit testimony that the witness "entered the country illegally and used an alias to obtain employment, and defendant amply explored these issues on cross-examination").

64. *See* Hernandez v. City Wide Insulation of Madison, Inc., No. 05C0303, 2006 WL 3474182 (E.D. Wis. Nov. 30, 2006); State v. Anderson, I-00-12-1354, 2006 WL 1911586 (N.J. Super. Ct. App. Div. July 13, 2006) (finding no abuse of discretion in restriction of cross-examination); State v. Hatcher, 524 S.E.2d 815 (N.C. Ct. App. 2000) (finding abuse of discretion).

cases,[65] including some criminal cases,[66] suggest that such impeachment is generally impermissible.[67]

The rule requires impeachment based on specific instances of "conduct"—not mere status—so impeachment must be connected to some act, such as illegally entering the country. Yet, the conduct requirement is a limited screen. Working in the United States without authorization typically requires using forged or counterfeit documents or false names. This conduct is criminal and may well warrant impeachment.[68]

C. Undocumented Status: Ineligibility for Nonprison Sentences

Undocumented status plays a significant role in sentencing. In many jurisdictions, being undocumented is a factor militating against a nonprison disposition, such as probation,[69] work release,[70] or drug treatment.[71]

65. *See* First Am. Bank *ex rel.* Estate of Montero v. W. DuPage Landscaping, Inc., No. 00 C 4026, 2005 WL 2284265, at *1 (N.D. Ill. Sept. 19, 2005) ("With regard to the citizenship status of witnesses, GM has not identified any authority under Rule 608(b) standing for the broad proposition that the status of being an illegal alien impugns one's character for truthfulness or untruthfulness." (citing Mischalski v. Ford Motor Co., 935 F. Supp. 203, 207–08 (E.D.N.Y. 1996))); *Mischalski*, 935 F. Supp. at 207–08 ("Ford has cited no authority, and the court is aware of none, to support the conclusion that the status of being an illegal alien impugns one's credibility. Thus, by itself, such evidence is not admissible for impeachment purposes."); *see also* State v. Avendano-Lopez, 904 P.2d 324, 331 (Wash. Ct. App. 1995) ("Questions regarding a defendant's immigration status are . . . irrelevant and designed to appeal to the trier of fact's passion and prejudice and thus are generally improper areas of inquiry.").

66. In civil cases, California law prohibits impeachment with specific instances of conduct. *See* Hernandez v. Paicius, 134 Cal. Rptr. 2d 756 (Ct. App. 2003) (finding illegal alien status inadmissible under CAL. EVID. CODE § 787's prohibition of impeachment based on specific instances of conduct). However, this limitation is inapplicable in criminal cases. *See* People v. Harris, 767 P.2d 619 (Cal. 1989).

67. The Connecticut Supreme Court upheld a trial court's refusal to allow impeachment based on working in violation of the terms of an otherwise valid visa. State v. Marra, 489 A.2d 350, 360–61 (Conn. 1985).

68. *See* United States v. Lora-Pena, 227 F. App'x 162, 167–68 (3d Cir. 2007) (allowing impeachment based on the defendant's use of a false name); United States v. Williams, 986 F.2d 86, 89 (4th Cir. 1993) (allowing impeachment based on using false identification); United States v. Page, 808 F.2d 723, 730 (10th Cir. 1987) (noting that impeachment is permissible based on forgery or uttering forged instruments); Harper v. State, 970 A.2d 199, 200–02 (Del. 2009) (same).

69. *See* United States v. Tamayo, 162 F. App'x 813, 816 (10th Cir. 2006); People v. Hernandez-Clavel, 186 P.3d 96, 99–100 (Colo. App. 2008) (citing cases from California, the District of Columbia, Indiana, Kansas, Maine, Oregon, and the Seventh Circuit), *cert. dismissed*, No. 2008SC237, 2009 Colo. LEXIS 1116 (Colo. Jan. 26, 2009).

70. *See* Jimenez v. Coughlin, 501 N.Y.S.2d 539 (App. Div. 1986).

71. *See* People v. Arciga, 227 Cal. Rptr. 611 (Ct. App. 1986); State v. Swanson, 146 Wash. App. 1026 (Ct. App. 2008); *see also* State v. Osman, 139 P.3d 334 (Wash. 2006) (allowing denial of a sex offender sentencing alternative).

Georgia,[72] Kansas,[73] and Washington[74] statutes limit eligibility of removable noncitizens.

There are two rationales for considering undocumented status in these sentencing decisions. Some courts regard undocumented individuals as unwilling to obey the law and therefore unsuitable for probation.[75] In these jurisdictions, the critical question would be whether, regardless of current status, the defendant had previously entered in violation of law.

Other courts reason that those subject to deportation are unlikely to comply with the terms of probation because they often require treatment, community service, or other conduct in the United States.[76] In these jurisdictions, the question is whether a defendant is currently removable or whether he will be removable based on his conviction. Kansas, oddly, equivocates on this point; by statute it prohibits nonprison drug treatment as an alternative sentence to those with immigration detainers,[77] but by case law it prohibits

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72. For example, GA. CODE ANN. § 17-10-1.3(c) (2008) provides:

> If the court determines that the person to be sentenced would be legally subject to deportation from the United States while serving a probated sentence, the court may:
>
> (1) Consider the interest of the state in securing certain and complete execution of its judicial sentences in criminal and quasi-criminal cases;
>
> (2) Consider the likelihood that deportation may intervene to frustrate that state interest if probation is granted; and
>
> (3) Where appropriate, decline to probate a sentence in furtherance of the state interest in certain and complete execution of sentences.

See also id. § 42-9-43.1 (Supp. 2010) (allowing the same considerations for parole determinations).

73. KAN. STAT. ANN. § 21-4729(h)(1)(B) (2007) (providing that "offenders who are not lawfully present in the United States and being detained for deportation" are ineligible for nonprison drug treatment).

74. WASH. REV. CODE ANN. § 9.94A.660(1)(e) (West 2010) (stating that a drug offender sentencing alternative is available if "[t]he offender has not been found by the United States attorney general to be subject to a deportation detainer or order and does not become subject to a deportation order during the period of the sentence"); *id.* § 9.94A.690(3)(d) (stating the same for the work-ethic camp alternative).

75. *See* People v. Hernandez-Clavel, 186 P.3d 96, 99 (Colo. App. 2008) (citing United States v. Gomez, 797 F.2d 417, 419 (7th Cir. 1986); Alexander v. State, 837 N.E.2d 552, 556 (Ind. Ct. App. 2005), *disapproved of on other grounds by* Ryle v. State, 842 N.E.2d 320 (Ind. 2005); State v. Zavala-Ramos, 840 P.2d 1314, 1316 (Or. Ct. App. 1992)), *cert. dismissed*, No. 2008SC237, 2009 Colo. LEXIS 1116 (Colo. Jan. 26, 2009).

76. *See id.* at 99–100 (citing People v. Espinoza, 132 Cal. Rptr. 2d 670, 675 (Ct. App. 2003)); State v. Svay, 828 A.2d 790, 794 (Me. 2003); *see also, e.g.*, People v. Galvan, 66 Cal. Rptr. 3d 426, 430–31 (Ct. App. 2007); Ruvalcaba v. State, 143 P.3d 468, 470 (Nev. 2006) (affirming denial of probation where the sentencing judge reasoned that "as an illegal alien, Ruvalcaba would likely be deported if he received probation and would thus ultimately avoid punishment" (citing People v. Sanchez, 235 Cal. Rptr. 264, 267 (Ct. App. 1987))); State v. Morales-Aguilar, 855 P.2d 646, 647–48 (Or. Ct. App. 1993).

77. KAN. STAT. ANN. § 21-4729(h)(1)(B) (stating that "offenders who are not lawfully present in the United States and being detained for deportation" are ineligible for nonprison drug treatment).

consideration of undocumented entry as a ground for denying probation unless the individual has previously been deported.[78]

D. Illegal Entry as an Aggravating Factor at Sentencing

A court, clearly, may not aggravate a sentence based on a defendant's race, alienage, nationality, ethnicity, or nativity.[79] Yet, decisions from Arizona,[80] Connecticut,[81] the District of Columbia,[82] Florida,[83] Georgia,[84] Idaho,[85]

78. State v. Martinez, 165 P.3d 1050, 1057 (Kan. Ct. App. 2007) ("If Martinez has not previously been deported, then the mere fact of his illegal alien status does not in itself render him unamenable to probation.").

79. *See* United States v. Leung, 40 F.3d 577, 586–87 (2d Cir. 1994); United States v. Onwuemene, 933 F.2d 650, 651 (8th Cir. 1991) (holding that the defendant's right to due process was violated when the court imposed a harsher sentence based on his national origin and alienage (citing United States v. Borrero-Isaza, 887 F.2d 1349, 1352 (9th Cir. 1989))); People v. Gjidoda, 364 N.W.2d 698, 701 (Mich. Ct. App. 1985) (holding that sentencing based on national origin or alienage violates equal protection).

80. State v. Alcala, No. 2 CA-CR 2007-0161, 2008 WL 2756496, at *5 (Ariz. Ct. App. May 8, 2008) ("Here, the record suggests that the trial court considered Alcala's immigration status as an aggravating factor only to the extent that it represented evidence of disregard for the law, not as a pretext to punish Alcala for his national origin or lack of citizenship."); State v. Alire, No. 2 CA-CR 2004-0044, 2005 Ariz. App. LEXIS 10, at *3–6 (Ariz. Ct. App. Jan. 28, 2005), *review denied and depublished*, 121 P.3d 172 (Ariz. 2005). An Arizona statute is to the same effect. *See* ARIZ. REV. STAT. ANN. 13-701(D)(21) (2010) (considering as an aggravating circumstance whether "[t]he defendant was in violation of 8 United States Code section 1323, 1324, 1325, 1326 or 1328 at the time of the commission of the offense").

81. State v. Charles, No. CR97126744, 2003 WL 1848630, at *1 (Conn. Super. Ct. Mar. 25, 2003) ("There are aggravating factors present here . . . [including the fact that] petitioner is an illegal alien . . . .").

82. Yemson v. United States, 764 A.2d 816, 819 (D.C. 2001) (noting that while a noncitizen cannot be punished more harshly simply because of alienage or nationality, "[t]his does not mean, however, that a sentencing court, in deciding what sentence to impose, must close its eyes to the defendant's status as an illegal alien and his history of violating the law, including any law related to immigration").

83. Viera v. State, 532 So. 2d 743, 745–46 (Fla. Dist. Ct. App. 1988) (per curiam) ("The trial court could properly consider Viera's illegal status in the country as a manifestation of his flagrant disregard for the laws of this country and a clear and convincing reason for departure." (citing, inter alia, United States v. Gomez, 797 F.2d 417 (7th Cir. 1986))). *But see* Cortez-Gonzalez v. State, 508 So. 2d 393, 394 (Fla. Dist. Ct. App. 1987) (holding that increasing a sentence based on illegal alien status would "violate Fla. R. Crim. P. 3.701(d)(11) because they punish defendant for offenses for which he was not convicted" (citing Bram v. State, 496 So. 2d 882 (Fla. Dist. Ct. App. 1986))).

84. Trujillo v. State, 698 S.E.2d 350, 354 (Ga. Ct. App. 2010) ("[W]e conclude that the trial court did not violate Trujillo's constitutional rights by considering his illegal alien status a relevant factor in formulating an appropriate sentence.").

85. State v. Beltran, 706 P.2d 85, 86 (Idaho Ct. App. 1985) (per curiam) ("Next considered is the character of the offender. At the time of the offense, Beltran was a twenty-six-year-old illegal alien from Mexico with a second grade education.").

Indiana,[86] Michigan,[87] Ohio,[88] Oregon,[89] and Texas[90] have held that a particular subset of noncitizens may permissibly receive a higher sentence for unauthorized entry.[91] These courts hold that the "disregard for the law" that might be said to accompany unlawful entry is a basis for increasing a sentence.[92] As the Tenth Circuit explained, "Entering the United States illegally is a federal crime. A sentencing court is at liberty to consider such prior conduct when sentencing a defendant for a different and unrelated crime."[93]

II. ADVANTAGES FOR NONCITIZENS

Some noncitizens have advantages in the criminal justice system. Noncitizens can sometimes obtain plea bargains and sentences that are structured to avoid deportation. When deportation is inevitable, some prosecutors and courts will offer or impose reduced sentences. In addition, federal law allows early release of state and federal prisoners for the purpose of deportation. These considerations are available only to noncitizens.

A. Charges and Pleas to Avoid Immigration Consequences

At least thirty-two jurisdictions require judges to notify defendants of the possibility of deportation based on criminal conviction before a guilty

86. Sanchez v. State, 891 N.E.2d 174, 176 (Ind. Ct. App. 2008) ("The trial court found Sanchez's illegal alien status reflects disregard for the law. . . . Based on the language in [*Samaniego-Hernandez v. State*, 839 N.E.2d 798, 806 (Ind. Ct. App. 2005)], Sanchez's illegal alien status is a valid aggravator.").

87. People v. Guerra, No. 283133, 2009 WL 1397145, at *2 (Mich. Ct. App. May 19, 2009) ("[A] substantial and compelling factor that supported the sentence departure was the fact that defendant *repeatedly* came into this country illegally *and* committed crimes, particularly home invasions.").

88. State v. Gonzalez, 796 N.E.2d 12, 37 (Ohio Ct. App. 2003) (accepting as valid aggravating facts that "Gonzalez had convictions for other crimes, and that he had an INS detainer currently on him for being in the country illegally"). *But cf.* State v. Mateo, 782 N.E.2d 131 (Ohio Ct. App. 2002) (reversing where the prison sentence was based on illegal alien status alone, without consideration of other applicable factors).

89. State v. Zavala-Ramos, 840 P.2d 1314 (Or. Ct. App. 1992) ("[I]mmigration status *per se* is not relevant. However, circumstances that demonstrate a defendant's unwillingness to conform his conduct to legal requirements, [such as illegal residency], may be.").

90. Infante v. State, 25 S.W.3d 725, 727 (Tex. App. 2000) ("If the trial court had taken appellant's status as an illegal alien into account, no error would have been committed.").

91. *See also* People v. Medina, 851 N.E.2d 1220, 1223 (Ill. 2006) (rejecting the claim that the sentence was excessive, and noting without criticism that the defendant's undocumented status was advanced as a basis for the sentence).

92. *See, e.g.*, State v. Alcala, No. 2 CA-CR 2007-0161, 2008 WL 2756496, at *5 (Ariz. Ct. App. May 8, 2008).

93. United States v. Garcia-Cardenas, 242 F. App'x 579, 583 (10th Cir. 2007) (citations omitted).

plea,[94] most doing so by rule or statute.[95] Colorado and Indiana impose the duty by case law.[96] Almost all of these jurisdictions require this notice as a matter of policy rather than because of a state constitutional requirement. Theoretically, notice could be required as a matter of information to the defendant. However, the possibility of deportation applies whether the defendant was convicted based on a plea or after a trial. The rules do not provide for notice in advance of trial. Accordingly, notice for notice's sake cannot be the explanation. These rules are better understood as putting deportation in issue in the criminal case so it can be considered during plea bargaining.[97]

In *Padilla v. Kentucky*,[98] the Court clearly indicated that this sort of bargaining was legitimate. The Court explained that awareness of immigration consequences could benefit both sides because defense counsel

> may be able to plea bargain creatively with the prosecutor [to] reduce the likelihood of deportation, by avoiding a conviction for an offense that automatically triggers the removal consequence. At the same time,

94. ALASKA R. CRIM. P. 11(c)(3)(C) (2011); ARIZ. R. CRIM. P. 17.2(f) (2011); CAL. PENAL CODE § 1016.5 (West 2008); CONN. GEN. STAT. ANN. § 54-1j (West 2001); D.C. CODE § 16-713 (LexisNexis 2008); FLA. R. CRIM. P. 3.172(c)(8) (2010); GA. CODE. ANN. § 17-7-93(c) (2008); HAW. REV. STAT. ANN. § 802e-2 (LexisNexis 2007); IDAHO CRIM. R. 11(d)(1) (2010); 725 ILL. COMP. STAT. ANN. 5/113-8 (West 2006); IOWA R. CRIM. P. 2.8(2)(b)(3); KY. COURT OF JUSTICE, MOTION TO ENTER GUILTY PLEA ¶ 10 (2007), *available at* http://courts.ky.gov/NR/rdonlyres/55E1F54E-ED5C-4A30-B1D5-4C43C7ADD63C/0/491.pdf; ME. R. CRIM. P. 11(h) (West 2010); MD. R. CRIM. P. 4-242(e) (LexisNexis 2010–11); MASS. ANN. LAWS ch. 278, § 29D (LexisNexis 2002); MASS. R. CRIM. P. 12(c)(3)(C); MINN. R. CRIM. P. 15.01, 15.02; MONT. CODE ANN. § 46-12-210(1)(f) (2009); NEB. REV. STAT. ANN. § 29-1819.02 (2008); NEW JERSEY JUDICIARY, PLEA FORM, para. 17 (2009), *available at* http://www.judiciary.state.nj.us/forms/10079_main_plea_form.pdf (promulgated pursuant to N.J. R. CRIM. P. 3-9); N.M. R. CRIM. P. 5-303(F)(5) (2011); N.Y. CRIM. PROC. LAW § 220.50(7) (McKinney Supp. 2011) (to be repealed Sept. 1, 2011); N.C. GEN. STAT. § 15a-1022(a)(7) (2009); OHIO REV. CODE ANN. § 2943.031 (West 2006); OR. REV. STAT. § 135.385(2)(d) (2009); CRAWFORD CNTY., PA., *Written Plea Colloquy*, *in* LOCAL RULES OF CRIMINAL PROCEDURE 35, 41 ¶ 30 (2010), *available at* http://www.crawfordcountypa.net/pls/portal/url/ITEM/8708C46 AC5274704BE4D283A08C7D6C5 (advising of possibility of deportation); P.R. R. CRIM. P. 70; R.I. GEN. LAWS § 12-12-22 (2002); TEX. CODE CRIM. PROC. ANN. art. 26.13(a)(4) (West 2009); VT. STAT. ANN. tit. 13, § 6565(c) (2009); WASH. REV. CODE ANN. § 10.40.200 (West 2002); WIS. STAT. ANN. § 971.08 (West 2007); *see also* U.S. DIST. CT. FOR THE DIST. OF COLO., *Statement by Defendant in Advance of Plea of Guilty*, *in* LOCAL RULES OF PRACTICE, App. K ¶ 3 (2010), *available at* http://www.cod.uscourts.gov/Documents/LocalRules/FINAL_Revisions_2011_Complete_Local_Rules.pdf (form guilty plea notification requiring acknowledgement of possible deportation).

95. *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), now requires defense attorneys to provide advice regarding immigration consequences as well.

96. People v. Pozo, 746 P.2d 523 (Colo. 1987); Segura v. State, 749 N.E.2d 496 (Ind. 2001).

97. *See, e.g.*, CAL. PENAL CODE § 1016.5(b) ("Upon request, the court shall allow the defendant additional time to consider the appropriateness of the plea in light of the advisement as described in this section."); HAW. REV. STAT. ANN. § 802E-1 ("[T]he court in such cases shall grant the defendant a reasonable amount of time to negotiate with the prosecuting agency in the event the defendant or the defendant's counsel was unaware of the possibility of deportation . . . .").

98. 130 S. Ct. 1473.

> 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.[99]

Prosecutors in many jurisdictions considered the possibility of deportation when negotiating plea bargains even before *Padilla*. In 2001, Robert M.A. Johnson, the then-president of the National District Attorneys Association (NDAA), wrote, "Judges often consider the collateral consequences of a conviction" and prosecutors "must [also] consider them if we are to see that justice is done." He explained:

> This struggle for justice was evident in the mind of a highly respected district attorney in a major jurisdiction when he shared his agony in deciding the fate of a father who abused his child. This father, after all, would be deported upon conviction, destroying a family that the district attorney and the victim's family thought could be saved.[100]

Carefully elaborated principles of prosecution, such as the NDAA's *National Prosecution Standards* and the *United States Attorneys' Manual* allow consideration of particular hardship to the accused.[101] Accordingly, based on negotiations with defense counsel, prosecutors regularly consider lesser charges, diversion, or non-prosecution to allow relatively less serious offenders to avoid deportation,[102] such as when prosecutors granted a misdemeanor plea granted to the noncitizen mother of the famous "Balloon Boy."[103]

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99. *Id.* at 1486. For another example of the Supreme Court's recognition of the broad scope permitted in criminal plea bargaining, see *Town of Newton v. Rumery*, 480 U.S. 386, 396–98 (1987), which upheld a release from liability signed in exchange for dismissal of criminal charges.

100. Robert M.A. Johnson, *Message From the President: Collateral Consequences*, PROSECUTOR, May/June 2001, at 5.

101. NAT'L DIST. ATTORNEYS ASS'N, NATIONAL PROSECUTION STANDARDS 4-1.3(k) (3d ed. 2010) (stating that "undue hardship to the accused" can be a basis not to charge or to offer or accept a particular plea); UNITED STATES ATTORNEYS' MANUAL § 9-28.1000(A) (2008), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm#9-28.1000 (stating that "prosecutors may consider the collateral consequences" in determining "whether to charge" and "how to resolve" a case).

102. *See, e.g.*, Karen E. Crummy, *Deportations Avoided Via Plea Deals*, DENVER POST, Oct. 1, 2006, http://www.denverpost.com/counties08/ci_4424481; Jennifer Emmons, *Crane Suspect Gets Five Years Probation*, EL DEFENSOR CHIEFTAIN, Mar. 5, 2005, http://www.dchieftain.com/news/49261-03-05-05.html (quoting a prosecutor who stated that "we had to do a lot of scrambling and maneuvering to avoid deportation"); Peter Shinkle, *New Plea Helps Man Avoid Deportation*, ST. LOUIS POST-DISPATCH, Dec. 11, 2004, at 13.

103. *Balloon Boy Parents Plead Guilty in Deal to Avoid Mother's Deportation*, IRISH TIMES, Nov. 14, 2009, at 10, *available at* 2009 WLNR 22862783.

B. Sentencing to Avoid Deportation

Many appellate courts hold that immigration status is an appropriate sentencing factor and, therefore, a trial court may impose a sentence structured to avoid deportation.[104] This is particularly significant when the noncitizen has a legitimate basis upon which he resides in the United States and the only ground for his deportation will be the potential criminal conviction. As the Idaho Court of Appeals explained, "[Deportation] is often a very significant consequence for the defendant. . . . [T]he effect [of conviction] on immigration status is an appropriate consideration for a trial court in fashioning a sentence."[105] Similarly, the Maine Supreme Court ruled that "a defendant's immigrant status and the effect that criminal convictions and criminal sentences can have on deportation are factors that a sentencing court can consider."[106] The Alaska Court of Appeals held that "[c]ollateral consequences, including deportation, are appropriate sentencing considerations."[107] A California appeals court, in finding that an attorney's failure to negotiate a plea to a nondeportable offense constituted ineffective assistance of counsel, noted that a number of methods were available in appealing to the court and prosecutors to avoid deportation, noting that "[o]ne technique . . . to defend against adverse immigration consequences [is] to plead to a different but related offense. Another [is] to 'plead up' to a nonaggravated felony even if the penalty was stiffer. . . . Another technique . . . is to obtain a disposition of 364 days instead of 365 days."[108] The fact that the court found that it was ineffective assistance not to pursue these options implies that the court considered them to be proper and reasonably available.

While many decisions are to the same effect,[109] a few courts go the other

104. For a statute to the same effect, see N.Y. CRIM. PROC. LAW § 216.05(4)(b) (McKinney Supp. 2011) (allowing participation in diversion program without a plea of guilty "based on a finding of exceptional circumstances . . . [that] exist when, regardless of the ultimate disposition of the case, the entry of a plea of guilty is likely to result in severe collateral consequences").

105. State v. Tinoco-Perez, 179 P.3d 363, 365 (Idaho Ct. App. 2008) (footnote omitted).

106. State v. Svay, 828 A.2d 790, 791 (Me. 2003).

107. Silvera v. State, 244 P.3d 1138, 1150 (Alaska Ct. App. 2010).

108. People v. Bautista, 8 Cal. Rptr. 3d 862, 870 & n.8 (Ct. App. 2004); *see also* CAL. R. CT. 4.414(b) (including among criteria affecting the decision to grant or deny probation "[t]he likely effect of imprisonment on the defendant and his or her dependents" and "[t]he adverse collateral consequences on the defendant's life resulting from the felony conviction").

109. *See* People v. Vasquez, No. H026805, 2004 WL 2958297 (Cal. Ct. App. Dec. 21, 2004); State v. Lewis, 797 A.2d 1198 (Del. 2002); Commonwealth v. Gevorgiyan, No. 2003-CA-002743-MR, 2005 WL 1125194 (Ky. Ct. App. May 13, 2005); People v. Ping Cheung, 718 N.Y.S.2d 578, 582 (Sup. Ct. 2000) (reducing sentence to avoid deportation); Ochoa v. Bass, 181 P.3d 727, 731 (Okla. Crim. App. 2008) ("[W]here the sentencing judge has discretion in what sentence will be imposed, citizenship status is a circumstance that may affect the sentencing . . . ."); State v. Quintero Morelos, 137

way.[110] The Vermont Supreme Court held that the possibility of deportation was properly considered a neutral, rather than mitigating, factor.[111] While the Minnesota Court of Appeals holds that trial courts may not consider deportation at sentencing,[112] the Minnesota Supreme Court has reserved the issue.[113] Although there is a division of authority, most appellate decisions hold that an unanticipated possibility of deportation is not a basis to withdraw a guilty plea.[114]

C. Reduced Sentences for Agreeing to Deportation

State and federal courts sometimes grant sentencing concessions in exchange for a defendant's agreement to deportation. While state courts

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P.3d 114, 119 (Wash. Ct. App. 2006) (permitting reduction of a sentence to less than a year to prevent deportation).

110. When the federal Sentencing Guidelines were mandatory, a number of courts held that the possibility of deportation was not the basis for a downward departure. *See, e.g.*, United States v. Nnanna, 7 F.3d 420, 422 (5th Cir. 1993) ("Collateral consequences, such as the likelihood of deportation or ineligibility for more lenient conditions of imprisonment, that an alien may incur following a federal conviction are not a basis for downward departure." (citing United States v. Restrepo, 999 F.2d 640, 644 (2d Cir. 1993); United States v. Alverez-Cardenas, 902 F.2d 734, 737 (9th Cir. 1990); United States v. Soto, 918 F.2d 882, 884–85 (10th Cir. 1990))). However, even before the Guidelines were invalidated, this line of cases was superseded by Supreme Court cases recognizing more authority for sentencing courts to depart under the Guidelines. *See* United States v. Lopez-Salas, 266 F.3d 842, 846–47 (8th Cir. 2001) (discussing Koon v. United States, 518 U.S. 81 (1996), and its effect on prior appellate decisions); United States v. Garay, 235 F.3d 230, 234 n.19 (5th Cir. 2000).

111. State v. Avgoustov, 969 A.2d 139, 142 (Vt. 2009) (approving a trial court judgment "that defendant should not receive more lenient sentencing treatment than other defendants merely because he could be deported upon release from custody").

112. *E.g.*, State v. Carrillo, No. A08-0360, 2009 WL 113364, at *3 (Minn. Ct. App. Jan. 20, 2009).

113. State v. Kebaso, 713 N.W.2d 317, 324 n.7 (Minn. 2006) ("[W]hether immigration consequences may be considered in . . . sentencing is not before us . . . . While we note that judges have broad discretion in sentencing . . . and should consider all 'facts bearing on the exercise of sentencing discretion,' we leave resolution of this broader question for another day." (citation omitted)).

114. *Compare* United States v. Parrino, 212 F.2d 919 (2d Cir. 1954) (holding that the defendant was not allowed to withdraw a plea even though counsel misadvised the defendant on the deportation consequence), Reyna v. Commonwealth, 217 S.W.3d 274, 276 (Ky. Ct. App. 2007), Commonwealth v. DeJesus, 795 N.E.2d 547, 552 (Mass. 2003) (holding that the possibility of deportation is not a basis for changing a sentence after it has been rendered), Commonwealth v. Quispe, 744 N.E.2d 21, 24 (Mass. 2001) (holding that a court may not dismiss prosecution to avoid deportation), People v. Arcos, 522 N.W.2d 655, 657 (Mich. Ct. App. 1994), *and* State v. Leon, No. 04-0390-CR, 2005 WL 415182, at *1 (Wis. Ct. App. Feb. 23, 2005), *with* United States v. Bonilla, No. 09-10307, 2011 WL 833293 (9th Cir. Mar. 11, 2011) (holding that defense counsel's failure to provide requested advice on immigration consequences warrants withdrawal of a plea), State v. Corvelo, 369 P.2d 903, 905 (Ariz. 1962), *and* People v. Superior Court, 523 P.2d 636, 639–40 (Cal. 1974). *But cf.* People v. Mendoza, 90 Cal. Rptr. 3d 315 (Ct. App. 2009) (holding that a trial court could not resentence to 364 days after the term was completed).

cannot simply order removal of a noncitizen,[115] they find ways to encourage the departure of those they believe to be deportable.[116] In *State v. Marquez-Sosa*,[117] the Arizona Court of Appeals upheld a probation condition requiring the defendant to refrain from unlawfully entering or remaining in the United States and suspended a $137,000 fine on that condition. Similarly, the Idaho Supreme Court affirmed a trial judge's suspension of a prison sentence on the condition that federal authorities deport the defendant;[118] and a 1942 California Court of Appeals decision upheld a sentence of fifty years, with parole after four only if the person was deported.[119] Similarly, at one stage of Roman Polanski's child rape prosecution, part of his plea arrangement was that he "voluntarily deport himself."[120] Although the legality of some of these techniques might be questioned, a probation condition requiring cooperation with immigration authorities, or obedience to state and federal laws, including those dealing with immigration, almost certainly does not interfere with federal prerogatives.[121] Thus, without forcing a nondeportable alien or citizen to self-deport or demanding that federal authorities do anything, even state courts can induce the departure of those who federal authorities conclude have lost their right to live in the United States.

Federal courts, not surprisingly, are even more immediately involved in deportation. Congress incorporated deportation into federal plea bargaining and sentencing by authorizing the stipulation of deportability as part of a plea bargain.[122] In addition, Congress provided that deportation could be a condition

115. *See* 8 U.S.C. § 1229a(a)(1) (2006) ("An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien."); Rojas v. State, 450 A.2d 490, 492 (Md. Ct. Spec. App. 1982); State v. V.D., 951 A.2d 1088 (N.J. Super. Ct. App. Div. 2008); Commonwealth v. Nava, 966 A.2d 630 (Pa. Super. Ct. 2009); Commonwealth v. Joseph, 848 A.2d 934 (Pa. Super. Ct. 2004).

116. *See, e.g.*, State v. Osorio, 675 S.E.2d 144, 146 (N.C. Ct. App. 2009) ("The trial court further recommended that upon completion of his sentence that defendant be released to immigration authorities for deportation due to his status as an illegal alien.").

117. 779 P.2d 815 (Ariz. Ct. App. 1989).

118. State v. Martinez, 925 P.2d 832, 833 (Idaho 1996).

119. *Ex parte* Korner, 123 P.2d 111 (Cal. Ct. App. 1942).

120. Polanski v. Superior Court, 102 Cal. Rptr. 3d 696, 706 (Ct. App. 2009).

121. *See* People v. Antonio-Antimo, 29 P.3d 298, 304 (Colo. 2000) ("Clearly, the language that Respondent 'cooperate with deportation authorities' is legal and enforceable."); People v. Bolivar, 643 N.Y.S.2d 305, 309–10 (Sup. Ct. 1996) (upholding the probation condition that the defendant report to federal immigration authorities to clarify the defendant's status); *see also* State v. Yanez, 782 N.E.2d 146, 155 (Ohio Ct. App. 2002) (noting that deportation can affect sentence); State v. Rodriguez, 45 P.3d 541, 547 (Wash. 2002) (noting that a prosecution witness pleaded guilty to a separate charge because "the prosecutor agreed to recommend his deportation instead of a jail sentence").

122. 8 U.S.C. § 1228(c)(5) (2006).

of probation, but only by agreement.[123] Thus, deportation as part of a plea bargain or as part of a probationary sentence requires the defendant's affirmative consent. Because Congress knows that plea bargains are negotiated, Congress has implicitly recognized that deportation can be a bargaining chip affecting other aspects of plea agreements. Consistent with that assumption, prosecutors sometimes agree in plea bargains that consent to deportation warrants downward departure.[124]

Under the U.S. Sentencing Guidelines (Guidelines), courts can mitigate a sentence[125] based on a defendant's agreement not to contest deportation.[126] However, most circuits hold that the noncitizen must still have some colorable basis to avoid deportation to get credit. No special justification or rationale is required to sentence within a Guideline range. Accordingly, if courts sometimes hold that immigration status warrants a downward departure below a range, it is likely that more frequently they use the possibility of deportation as a reason for sentencing within but at the lower end of the range.

D. Mitigation of Programming and Housing Ineligibility

The federal correctional system makes many noncitizens ineligible for the residential drug treatment program—a valuable opportunity for several reasons including that those completing the program earn the possibility of a sentence reduction.[127] Inmates who are subject to immigration detainers—that is, virtually all undocumented inmates and lawful immigrants or nonimmigrants rendered deportable by conviction—are ineligible for early release.[128] Federal courts have upheld this ineligibility.[129]

Recognizing that noncitizens may be subject to harsher conditions of confinement, some courts have offered various forms of mitigation. The Seventh Circuit has held that "status as a deportable alien is relevant . . . insofar

123. 18 U.S.C. § 3563(b)(21) (2006).

124. *See, e.g.*, Plea Agreement at 6, United States v. Bernal-Castillo, No. 1:06CR487 (N.D. Ohio June 20, 2007), 2007 WL 4818673 ("In exchange for the defendant's agreement not to contest deportation/removal, the United States agrees that a one (1) level downward departure . . . is justified . . . pursuant to U.S.S.G. § 5K2.0.").

125. Of course, the Guidelines are now advisory. *See* United States v. Booker, 543 U.S. 220 (2005).

126. *See* United States v. Ramirez-Marquez, 372 F.3d 935, 938–39 (8th Cir. 2004) (citing cases from several circuits); United States v. Pacheco-Soto, 386 F. Supp. 2d 1198, 1206–07 (D.N.M. 2005) (granting downward departure based on deportable alien status).

127. 18 U.S.C. § 3621(e)(2)(B).

128. 28 C.F.R. § 550.55(b)(1) (2010); *see also* Nora V. Demleitner, *Terms of Imprisonment: Treating the Noncitizen Offender Equally*, 21 FED. SENT'G REP. 174 (2009).

129. *See* McLean v. Crabtree, 173 F.3d 1176, 1186 (9th Cir. 1999); Morales v. Wells, No. CV 308-116, 2009 WL 671672, at *3 (S.D. Ga. Mar. 13, 2009).

as it may lead to conditions of confinement, or other incidents of punishment, that are substantially more onerous than the framers of the guidelines contemplated in fixing the punishment range for [an] offense."[130] Similarly, the District of Columbia Circuit held, in a 2–1 decision, that courts could consider noncitizen ineligibility for the halfway house transition program, which is mandated by Congress for prisoners nearing the end of their sentences.[131] Moreover, plea agreements sometimes contain sentence considerations based on program ineligibility.[132]

E. Early Discharge for Deportation

Congress and many state legislatures have granted noncitizens a remarkable advantage:[133] Unlike citizens, noncitizens in state and federal prisons may be released before they complete their sentences.[134] However, they obtain this advantage only through deportation. Deportation before completion of a term of imprisonment applies only by request of the attorney general in the case of federal prisoners or by the request of the appropriate state official in the case of state prisoners. Many states with large immigrant and prisoner populations have enacted statutes allowing early release for deportation, including Arizona,[135] California,[136] Connecticut,[137] Hawaii,[138]

130. United States v. Guzman, 236 F.3d 830, 834 (7th Cir. 2001).

131. United States v. Smith, 27 F.3d 649, 650 (D.C. Cir. 1994) ("[A] court may depart below the range indicated by the Sentencing Guidelines where the defendant, solely because he is a deportable alien, faces the prospect of objectively more severe prison conditions than he would otherwise.").

132. *See, e.g.*, Plea Offer at 3, United States v. Salazar-Zuniga, No. 1:06-cr-239-RWR (D.D.C. Dec. 8, 2006), 2006 WL 4979440 ("[A] downward departure of six (6) months, no more and no less, is warranted, based on your client's status as a deportable alien, pursuant to *United States v. Smith*, and U.S.S.G. § 5K2.0(2)(B)." (citation omitted)); *see also* Plea Offer at 3, United States v. Rodriguez, No. CR 05-214 (RJL) (D.D.C. Jan. 9, 2007), 2007 WL 3313215 ("If a *Smith* departure applies, the Government will not oppose it before the trial court."); Plea Offer at 4, United States v. Medina, No. 05-387 (D.D.C. Mar. 6, 2006), 2006 WL 5515945 ("The Government also agrees not to oppose a downward departure pursuant to *United States v. Smith*, which permits a downward departure of up to six months for eligible defendant's who are illegal aliens." (citation omitted)); Plea Offer at 7, United States v. Diaz, No. 05-248-JR (D.D.C. June 30, 2005), 2005 WL 5906289 ("Pursuant to the ruling in *United States v. Smith*, the government will not object to a six month departure based upon your client's status as a deportable alien." (citation omitted)).

133. Of course, this will not be an advantage to those who would prefer to remain in the United States on any terms, even in prison, because they, for example, want to be close to family.

134. 8 U.S.C. § 1231(a)(4)(B) (2006). *See* Emily Bazar, *Deporting Some Immigrant Inmates a Big Break for States*, USA TODAY, Mar. 28, 2008, http://www.usatoday.com/news/nation/2008-03-27-Deport_N.htm.

135. ARIZ. REV. STAT. ANN. § 41-1604.14(A) (Supp. 2010).

136. CAL. PENAL CODE §§ 3082, 5025 (West 2000).

137. CONN. GEN. STAT. ANN. §§ 54-125d, -130b (West 2009).

138. HAW. REV. STAT. ANN. § 336-5 (LexisNexis 2008).

Illinois,[139] Kansas,[140] Michigan,[141] New Hampshire,[142] New York,[143] North Carolina,[144] Oklahoma,[145] Pennsylvania,[146] Texas,[147] Virginia,[148] Washington,[149] and Wisconsin.[150]

III. QUASI-CRIME AND QUASI-PUNISHMENT

Parts I and II show that citizens and noncitizens do not always stand on the same footing in the criminal justice system. Imagine three individuals—Andy, Barak, and Carissa—who commit the same car theft at the same time, and have identical backgrounds and records with one exception: Andy came to the United States one day before birth; Barak came one day after his birth but without legal status; and Carissa came one day after her birth and with a green card. Assume that the normal disposition for first offense car theft is probation. Accordingly, Andy, the citizen defendant, might get probation. Barak, the undocumented defendant, might be held for trial without bail, denied probation, and given an aggravated sentence of incarceration merely because of his undocumented status. By contrast, Carissa, the documented defendant, might be allowed to participate in a diversion program, thereby avoiding conviction entirely, or be allowed to plead guilty to and be sentenced for a different offense to avoid deportation. Accordingly, completely independent of deportation or other consequences in the immigration system, immigration status can make defendants substantially worse off, or better off, than other defendants in the domestic criminal justice system.

Padilla v. Kentucky,[151] therefore, as groundbreaking as it was, failed to capture the importance of immigration status to criminal defense under the law as it currently exists. Defense counsel needs to know not only whether his client is a noncitizen, but also the details of his client's status and what is likely to happen if his client is convicted of a particular offense. Of course, the importance of immigration in the criminal process could be addressed in

139. 730 ILL. COMP. STAT. ANN. 5/5-5-3(l) (West Supp. 2010).
140. KAN. STAT. ANN. § 22-3717(g) (Supp. 2008).
141. MICH. COMP. LAWS ANN. § 791.233(2) (West 2007).
142. N.H. REV. STAT. ANN. § 651:25(VII) (Supp. 2010).
143. N.Y. EXEC. LAW § 259-i(2)(d) (McKinney 2010).
144. N.C. GEN. STAT. § 148-64.1 (2009).
145. OKLA. STAT. ANN. 57 §§ 332.7(I), 530.4 (West Supp. 2011).
146. 50 PA. STAT. ANN. § 4414 (West 2001).
147. TEX. GOV'T CODE ANN. § 508.146(f) (West Supp. 2010).
148. VA. CODE ANN. § 53.1-220.1 (2009).
149. WASH. REV. CODE ANN. § 9.94A.685 (West 2010).
150. WISC. STAT. ANN. § 973.195(1r)(b)(4) (West Supp. 2010).
151. 130 S. Ct. 1473 (2010).

several ways. One way would be to expect defense attorneys to be aware of their clients' immigration status, like all other important legal and factual considerations. Another way would be to change criminal law, criminal procedure, and evidence law to make immigration status less important, or irrelevant, to the criminal proceeding.[152]

This Subpart explores potential objections to the current differential treatment of citizens, documented noncitizens, and undocumented noncitizens. It concludes that, while there are risks of unfair treatment, on balance, it is consistent with principles of due process and sound sentencing to consider immigration status in some cases. A general separation of immigration status and the criminal justice system would lead to more injustices than it would solve. However, the status quo is not perfect; immigration status should be considered and used more carefully than it is being considered and used today.

A. The Complexity of Immigration Status Determinations

One argument against using immigration in the criminal justice system is that nonspecialists will inevitably make mistakes. This is true—even if the determinations are 98 percent accurate, there will still be many mistakes as an absolute number.[153] In *Padilla*, the state trial court erroneously jailed Mr. Padilla based on a misunderstanding of his immigration status.[154] But this objection applies with respect to decisions benefitting noncitizens as well as those burdening noncitizens. Accordingly, if the fact that there will be some mistakes about immigration status or about means that the question itself should never be examined, then prosecutors and courts should not be concerned that their decisions will result in deportation; after all, they cannot be sure. In a system in which prosecutors and judges exercise discretion in order to achieve justice, absolutely foreclosing consideration of immigration status to avoid severe, unwarranted hardship to a defendant would be unfair.

There will be some gray areas in evaluating a defendant's immigration status or the effect of a particular conviction, but there will also be clear-cut situations. Among the important questions are (1) whether conviction for a particular offense will constitute an aggravated felony requiring deportation

152. *See supra* note 20 (explaining that the fundamental question of whether noncitizens should be so readily deportable based on criminal conviction has been set aside for purposes of this Article).

153. *See, e.g.*, State v. Pablo, No. W2007-02020-CCA-R3-CD, 2008 WL 2938090, at *1 (Tenn. Crim. App. July 30, 2008) (reversing denial of probation to an "illegal alien" based on insufficient evidence of status).

154. Commonwealth v. Padilla, 253 S.W.3d 482, 483 (Ky. 2008) ("Appellee's bond was changed because he was suspected of being an illegal alien . . . ."), *rev'd*, 130 S. Ct. 1473 ("Petitioner . . . has been a lawful permanent resident of the United States for more than 40 years.").

even of green card holders with no avenue of relief; and (2) whether the individual entered the United States without legal status. In the criminal justice system, lawyers and judges will often reliably determine the answers to these questions. If understanding a client's immigration status is recognized to be an important part of a defense attorney's job, then lawyers will get better at it over time.

B. Disadvantaging Noncitizens: The Racism Problem

Another general objection is that consideration of undocumented status is like race discrimination. The Nevada Supreme Court held that undocumented status cannot be considered at sentencing;[155] the Supreme Court of Georgia and the Supreme Court of Washington held that witnesses cannot be impeached merely because they are undocumented.[156] Although perhaps turning on details of state law, these courts have also concluded that consideration of undocumented immigration status is akin to consideration of race, alienage, or national origin.

These are tantalizing holdings. Undocumented entry or reentry is a crime in the United States Code for which many people are imprisoned.[157] Taken seriously, the claim of these courts is a radical one: that under existing legal doctrine, undocumented persons are in prison because of something equivalent to their race.

Impeaching or otherwise disadvantaging a defendant for unlawfully entering or remaining in the United States requires discrimination based on lack of citizenship. However, doctrinally, consideration of illegal alien status does not trigger the same level of scrutiny as classification based on race.[158] The permissible disadvantaging of undocumented persons is particularly clear in the context of federal prosecutions. Congress may regulate immigration and naturalization and the Supreme Court has recognized that, "[i]n the

155. Martinez v. State, 961 P.2d 143, 145 (Nev. 1998) ("Thus, the district court here violated appellants' due process rights, if it based its sentencing decision, in part, upon appellants' status as illegal aliens.").

156. Sandoval v. State, 442 S.E.2d 746, 747 (Ga. 1994) ("[A]n appeal to national or other prejudice is improper . . . and evidence as to . . . race, color, or nationality . . . is not admissible, where such evidence is introduced for such purpose and is not relevant to any issue in the action. . . . [T]his rule is equally applicable to evidence as to an individual's immigration status."); State v. Avendano-Lopez, 904 P.2d 324, 331 (Wash. Ct. App. 1995) (holding that impeachment based on illegal alien status is the equivalent of impeachment based on nationality or other impermissible prejudice).

157. *See* 8 U.S.C. §§ 1321–30 (2006).

158. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 223 (1982) ("Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a 'constitutional irrelevancy.'").

exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."[159] Accordingly, there can be no serious doubt that federal statutes making alienage an element of an offense[160] or making it a critical sentencing factor[161] are constitutional, even though they necessarily apply only to noncitizens.

The Court has invalidated most state regulation of documented immigrants, usually by applying either equal protection or preemption analysis.[162] By contrast, the Court has upheld some state regulation of documented noncitizens who were admitted as nonimmigrants and of undocumented noncitizens,[163] so long as the regulations were consistent with equal protection and did not interfere with federal policy. Under *Plyler v. Doe*,[164] state classifications against undocumented noncitizens are evaluated based on the rational basis test[165] while classifications against documented immigrants are at least semi-suspect. Similarly, in *DeCanas v. Bica*,[166] in an opinion written by Justice Brennan, the Court unanimously upheld a state statute that prohibited employers from hiring undocumented immigrants. It is impossible to conclude that in 1976, when Justices Marshall, Blackmun, and Stevens were members of the Court, the Justices would have unanimously upheld a state statute prohibiting

159. Mathews v. Diaz, 426 U.S. 67, 79–80 (1976).

160. *See, e.g.*, 18 U.S.C. § 922(g)(5) (2006).

161. *See* Almendarez-Torres v. United States, 523 U.S. 224 (1998) (allowing illegal reentry of a noncitizen as a sentencing factor).

162. *See, e.g.*, Sugarman v. Dougall, 413 U.S. 634 (1973) (holding it to be unconstitutional to exclude noncitizens from state civil service employment). In *Patsone v. Pennsylvania*, 232 U.S. 138 (1914), the Court held than an immigrant could be prohibited from possessing a firearm; with regard to a lawful permanent resident, it is likely overruled by modern precedent applying heightened scrutiny to state law classifications affecting lawfully admitted noncitizens. States may, however, prohibit undocumented noncitizens from possessing firearms. *See, e.g.*, State v. Hernandez-Mercado, 879 P.2d 283 (Wash. 1994) (holding that state may prohibit undocumented noncitizen from possessing firearm).

163. *See* DeCanas v. Bica, 424 U.S. 351 (1976).

164. 457 U.S. 202 (1982).

165. 42 U.S.C. § 1981(a) (2006) grants to "[a]ll persons" "the same right . . . to . . . give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." Section 1981 applies to classifications of noncitizens. Graham v. Richardson, 403 U.S. 365, 377 (1971); Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419 (1948); Lozano v. City of Hazleton, 496 F. Supp. 2d 477, 547 (M.D. Pa. 2007). The language of § 1981 implies that, as to the states, imposing more severe punishments on people because they are aliens, even "illegal aliens," is not treating them "the same" as citizens and not imposing "like punishment" and "no other." Notwithstanding its plain language, however, the Court has held that § 1981 is coextensive with the Equal Protection Clause. Grutter v. Bollinger, 539 U.S. 306, 343 (2003) (citing General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 389–391 (1982)). Accordingly, the equal protection analysis, more tolerant of discrimination in this case, controls the outcome.

166. 424 U.S. 351.

employment on the basis of race. Accordingly, undocumented status and race cannot be equivalent as a matter of constitutional doctrine.

States do not interfere with federal immigration policy by considering federal immigration violations at sentencing.[167] Accordingly, it is untenable to contend that disadvantaging undocumented noncitizens violates the Equal Protection Clause in the same way that it would to impeach individuals because they are not citizens or because they are from a particular foreign country.

The nonequivalence of discrimination against noncitizens and discrimination against undocumented noncitizens is shown by the inconsistency of the state precedents. *Sandoval v. State*[168] from the Georgia Supreme Court is one of the cases suggesting the unconstitutionality of impeachment based on immigration status. Justice Carley concurred specially in a majority opinion holding that impeachment was impermissible under Georgia evidence law (which differs from the Federal Rules of Evidence). However, he insisted that impeachment based on undocumented status was not the equivalent of impeachment based on race:

> Any prejudice directed against an individual solely because of his race, color, or nationality is based upon inherent factors which are totally beyond his control. An individual's immigration status, on the other hand, is a factor which is totally within his control . . . . One who voluntarily enters this country legally has committed no criminal act . . . . On the other hand, one who voluntarily enters this country illegally has committed a criminal act regardless of his race, color, or nationality and his illegal presence in this country is, for that reason, a prejudicial factor.[169]

This argument must be correct. If consideration of immigration status is akin to consideration of race or religion, then a 2008 Georgia Court of Appeals decision allowing immigration status to be a factor in setting bail[170] and a pair of Georgia statutes denying nonprison sentences[171] to undocumented

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167. The normal form of impermissible interference with federal immigration policy is state action discriminating against or driving out noncitizens or state action usurping federal discretion. Toll v. Moreno, 458 U.S. 1 (1982). There is no reason that a state court cannot consider at sentencing a federal conviction even in an area of exclusive federal jurisdiction. That is, even if a state would not have had the power to convene a court martial, it would be permissible for a state court to consider a court martial conviction in a subsequent state case.

168. 442 S.E.2d 746 (Ga. 1994).

169. *Id.* at 748 (Carley, J., concurring specially).

170. Hernandez v. State, 669 S.E.2d 434, 435 (Ga. Ct. App. 2008) (upholding $1,000,000 bail, and stating that "Hernandez's counsel conceded that Hernandez is not a United States citizen, and Hernandez presented no evidence that he was in this country legally").

171. GA. CODE ANN. § 17-10-1.3(c) (2008) (probation); *id.* § 42-9-43.1 (Supp. 2010) (parole).

persons are now presumably as void as Georgia's Jim Crow laws were after *Brown v. Board*, and for the same reason.

Similarly, the Nevada Supreme Court held that status could not be used to aggravate a sentence, but it could be a basis upon which to deny probation.[172] While the Washington Court of Appeals rejected impeachment based on status,[173] the Washington legislature denied drug offender alternative sentencing to precisely the same class—undocumented noncitizens.[174] It makes no sense for Georgia and Washington to hold simultaneously that it is unconstitutional to consider immigration status as a factor in evaluating witness credibility, but that immigration status is sufficiently weighty that it alone can mandate a prison sentence rather than probation. If consideration of immigration status in state court proceedings is wrong, it is wrong for some reason other than that it violates current judicial understandings of the Equal Protection Clause.[175]

Nevertheless, courts suspicious of using undocumented status are on to something. Undocumented status is not a racial classification in and of itself because an undocumented person can be of any race. However, as a practical matter, consideration of undocumented status provides an easy proxy for consideration of race. A majority of the undocumented people in the United States are Mexican (6.6 million out of 10.75 million in 2009) and an even larger share are nonwhite when other undocumented Latinos and undocumented Asians are added.[176] Accordingly, while discrimination against undocumented people is not ipso facto race discrimination doctrinally, broad use of the classification could be a cover for discrimination. This

172. Ruvalcaba v. State, 143 P.3d 468, 470 (Nev. 2006).

173. State v. Avendano-Lopez, 904 P.2d 324, 331 (Wash. Ct. App. 1995) (holding that impeachment based on illegal alien status is equivalent to impeachment based on nationality or other prejudice).

174. *See* WASH. REV. CODE. ANN. § 9.94A.660(1)(e) (2010) (stating that a drug offender sentencing alternative is available if "[t]he offender has not been found by the United States attorney general to be subject to a deportation detainer or order and does not become subject to a deportation order during the period of the sentence"); *id.* § 9.94A.690(3)(d).

175. None of this is to concede that current doctrine is correct; immigration policy has been justly criticized for its racism and racial disproportionality in a number of dimensions. *See, e.g.*, Gabriel J. Chin, *Segregation's Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998). The system of offering admission to immigrants, and the substance and procedure of deportation of noncitizens, would likely be quite different in a world untainted by historical and present racism. However, use of immigration classifications and status for purposes of the criminal justice system is not different than using immigration classifications and status for purposes of, say, the immigration system.

176. MICHAEL HOEFER, NANCY RYTINA & BRYAN C. BAKER, ESTIMATES OF THE UNAUTHORIZED IMMIGRANT POPULATION RESIDING IN THE UNITED STATES: JANUARY 2009, at 4 (2010), *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/ois_ill_pe_2009.pdf.

would be particularly so at a moment when treatment and status of noncitizens is a major political controversy, such as it is today. What follows are some thoughts about structuring and limiting particular disadvantages imposed on noncitizens so they are applied only when legitimate, and not used as subterfuges for discrimination.

1. Sentencing

Denial of nonprison alternatives normally means that an individual will be sentenced to prison—an undesirable and painful outcome. Yet, considering status to evaluate whether a defendant will be able to perform community service or pay restitution is mere acknowledgement of the fact that undocumented persons are susceptible to deportation. The stakes involved make careful investigation an indispensable aspect of fairness, but a well-informed lawyer or judge can now make a reasonably accurate prediction about whether a particular individual, if charged with a particular crime, is likely to be the target of removal proceedings.[177] In states with large numbers of noncitizens, judges setting bail or sentencing people with immigration detainers have extensive experience with what will happen under various factual scenarios.

Sentences are aggravated based on unlawful entry on the theory that the conduct was a past crime, albeit usually one for which the defendant was not convicted. An essential predicate for application of this aggravator is that the conduct actually be criminal. Therefore, the aggravator is inapplicable to persons who may be present without legal status, but who have committed no crime. It is not a federal criminal offense to overstay one's visa, so the aggravator is inapplicable to such persons. Most who entered as infants or children are not criminally responsible because they lacked mens rea or actus reus, or because they have the defense of infancy.

For those who are criminally responsible, the unlawful entry aggravator will not always have the same weight. One consideration is the connection between the unlawful entry and the crime for which the defendant is being sentenced. A noncitizen who unlawfully entered the United States for the purpose of committing crimes might deserve aggravation. The illegal entry facilitated the crime and those coming here to commit crimes are the individuals that the immigration system is particularly designed to exclude. The illegal entry differentiates this particular offender from others who

177. *See, e.g.*, ROBERT JAMES MCWHIRTER, THE CRIMINAL LAWYER'S GUIDE TO IMMIGRATION LAW (2d ed. 2006).

committed similar crimes. In a different position is a noncitizen who unlawfully entered the United States for the purpose of lawful work or for other lawful activity and whose crime was an isolated incident in an otherwise law-abiding life. There, the connection between the unlawful status and the crime is essentially coincidental. Such a person is not significantly more culpable than others who engaged in similar misconduct. Accordingly, his sentence should not be significantly aggravated.

Then there is the problem of where to place unlawful entry on the spectrum of uncharged misconduct. Immigration prosecutions represent a substantial part of the federal criminal docket. According to Professor Ingrid Eagly's data—which she obtained through Freedom of Information Act requests—counting prosecutions before magistrates, there were almost 75,000 immigration prosecutions terminated in fiscal year 2008 and nearly 80,000 in fiscal year 2009.[178] Although perhaps insubstantial as a proportion of immigration violations, immigration prosecution is a major part of the federal criminal law enforcement effort as a whole. There is no reason that serious or repetitive immigration felonies should not be considered in sentencing.

Again, though, immigration offenses are notoriously underenforced.[179] Indeed, at least as much as with the classic underenforced crimes, drug and traffic offenses,[180] responsible officials have acknowledged that unlawful entry is not going to be resolved through law enforcement. In 2006, President George W. Bush stated, "Massive deportation of the people here is unrealistic. It's just not going to work."[181] President Obama has made statements to the same effect.[182] Undoubtedly, President Bush and President Obama are correct. If civil deportation is off the table, it is even clearer that criminal prosecution, which is elaborate and expensive, will not be used to address this issue. The tradition[183] of underenforcement underscores the fact that many immigration

178. Eagly, *supra* note 10, at 1301 n.117, 1353 fig.4.

179. For a general discussion of the underenforcement of crimes, see Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715 (2006).

180. Margaret Raymond, *Penumbral Crimes*, 39 AM. CRIM. L. REV. 1395 (2002).

181. President George W. Bush, Immigration Reform: Address in California (Apr. 24, 2006), *available at* http://www.presidentialrhetoric.com/speeches/04.24.06.html.

182. President Barack Obama, News Conference in Guadalajara (Aug. 10, 2009), *available at* http://www.nytimes.com/2009/08/11/world/americas/11prexy.text.html ("[W]e can create a system in which you have strong border security, we have an orderly process for people to come in, but we're also giving an opportunity for those who are already in the United States to be able to achieve a pathway to citizenship so that they don't have to live in the shadows, and their children and their grandchildren can have a full participation in the United States.").

183. Professor Neuman points out that between 1929 and 1986, there were five major immigration amnesties. Gerald L. Neuman, Remarks, *Administrative Law: Immigration, Amnesty, and the Rule of Law*, 36 HOFSTRA L. REV. 1335 (2008).

offenses are *malum prohibitum* regulatory offenses; they do not represent intrinsically immoral conduct, such as rape, robbery or murder, which warrants strenuous efforts at prevention and detection. Based on their regulatory nature and their historical underenforcement, there is a serious argument that garden-variety immigration misdemeanors are not "real" crimes; they are more like the minor offenses identified by the Guidelines that should not be considered in calculating a sentence.[184]

As Professor Eagly's work has demonstrated, Congress quite consciously made crossing the border without authorization not just a misdemeanor, but a petty offense.[185] As a petty offense, those charged with the basic crime[186] may be tried before a magistrate judge, thus dispensing with both an Article III judge and a jury.[187] The Court has made clear that penalty is the most important measure of the seriousness of an offense.[188] Crossing the border unlawfully is much less serious than the trivial postal crime of reusing a stamp that has gone through the mail without being cancelled, which can be punished by up to one year in jail.[189] Stamp reuse is so serious under the law that it entitles a defendant to a jury trial before an Article III judge.

The trivial nature of unlawful entry offers a method of testing the legitimacy of a sentence enhancement: whether the sentences of others who also committed minor nonimmigration crimes are also enhanced. Judges should not enhance sentences for simple unlawful entry into the United States unless they also aggravate sentences for other minor offenses. Since minor prior offenses do not generally lead to major enhancements at sentencing for subsequent crimes, unlawful entry, without more, generally should not be used as a significant aggravating factor.

2. Bail

In the bail context, immigrant status is a legitimate factor to the extent that it reflects community ties and risk of flight, and therefore the likelihood of appearing at trial. However, if federal immigration authorities do not

184. *See* U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(c) (2010).

185. *See* Eagly, *supra* note 10.

186. 8 U.S.C. § 1325(a) (2006) ("Any alien who (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers . . . shall, for the first commission of any such offense, be fined under title 18 or imprisoned not more than 6 months, or both . . . .").

187. *See* 18 U.S.C. § 3401(b) (2006); Lewis v. United States, 518 U.S. 322 (1996).

188. *See, e.g.*, Blanton v. City of N. Las Vegas, 489 U.S. 538 (1989).

189. 18 U.S.C. § 1720 ("Whoever knowingly uses in payment of postage, any postage stamp, postal card, or stamped envelope, issued in pursuance of law, which has already been used for a like purpose—Shall be fined under this title or imprisoned not more than one year, or both . . . .").

detain or deport a particular defendant, then the bail determination should be made primarily by application of the usual factors. While a noncitizen who entered the country recently and without authorization may well present a significant risk of flight, a longtime resident without authorization may well have family ties and community connections that make her indistinguishable as a matter of risk from a citizen or lawful permanent resident. Automatic or presumptive detention of a noncitizen with substantial community ties is not necessary, even when the individual is undocumented.

Although at least one court has upheld automatic denial of bail to the undocumented,[190] indiscriminate detention smacks of impermissible preconviction punishment.[191] Indeed, Professor Kris Kobach has identified denial of bail to undocumented noncitizens as one of the steps a state can take to reinforce "federal immigration law" as well as to ensure that defendants show up at trial.[192] But reinforcing federal immigration law is not what bail is for.

3. Impeachment

Not everyone in the United States without authorization has committed even a technical violation of law for which they might be impeached. Some undocumented noncitizens may have been told that they were citizens or were brought to the United States as children and thus are not responsible for their entry or presence. Others, like visa overstayers, may be potentially removable, but because they originally entered in full compliance with law, they cannot be impeached. Accordingly, the foundational question of how an individual entered the United States will loom large in every effort to impeach a witness.

In *People v. Scales*,[193] the California Court of Appeals upheld the trial court's refusal to permit impeachment of an undocumented prosecution witness, reasoning that being in the United States without legal status is not necessarily an act of moral turpitude.[194] The court rejected the idea that

> the mere fact of his illegal immigration status entails dishonesty or other conduct demonstrating a willingness to be untruthful for personal gain.

190. Hernandez v. Lynch, 167 P.3d 1264 (Ariz. Ct. App. 2007) (upholding a statute denying bail to undocumented noncitizens).

191. *See id.* at 1276 n.11 (Kessler, J., concurring) ("[L]egislative intent is important because, if the express intent was to punish persons illegally in the country, Proposition 100 would probably be facially invalid." (citing United States v. Salerno, 481 U.S. 739, 747 (1987))); State v. Blackmer, 631 A.2d 1134, 1140 (Vt. 1993) ("[B]ail cannot be denied in order to inflict pretrial punishment . . . ." (citing *Salerno*, 481 U.S. at 747, 749)).

192. Kris W. Kobach, *Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration*, 22 GEO. IMMIGR. L.J. 459, 480 (2008).

193. No. D041118, 2004 WL 1759259 (Cal. Ct. App. Aug. 6, 2004).

194. *Id.* at *7 (upholding exclusion of immigration status for impeachment purposes).

> We agree that illegal immigration status does not, per se, reflect a pattern of deceit that would be relevant to Quiroz's credibility given the variety of ways an undocumented person can enter the United States, including by being brought here as a child.[195]

An essential foundation for any negative action based on undocumented status is that the particular facts and circumstances actually warrant condemnation. For this reason, every effort at impeachment will take some time.

Another wise analytical approach comes from the Texas Supreme Court, which applied its own version of Federal Rule of Evidence 608(b), a rule that, unlike its federal counterpart, generally prohibits impeachment based on specific acts other than conviction.[196] However, the court persuasively suggested that impeachment should not be permitted except as to prosecution witnesses:

> Even assuming the immigration evidence had some relevance, its prejudicial potential substantially outweighed any probative value. Even in instances where immigration status may have limited probative value as to credibility, courts have held that such evidence is properly excluded for undue prejudice under Rule 403. The only context in which courts have widely accepted using such evidence for impeachment is in criminal trials, where a government witness's immigration status may indicate bias, particularly where the witness traded testimony for sanctuary from deportation.[197]

With regard to prosecution witnesses, a criminal defendant is armed with the Sixth Amendment right of confrontation. This justifies courts in hesitating before denying the defendant an opportunity to cross-examine. As to other witnesses, however, the possibility of injecting racial bias into the proceeding, as well as the difficulty of laying a foundation, makes resort to Rule 403 appropriate in most cases.

C. Advantaging Noncitizens: Deportation as Quasi-Punishment

Deportation is not punishment as a matter of constitutional doctrine,[198] a

195. *Id.*

196. TEX. R. EVID. 608(b).

197. TXI Transp. Co. v. Hughes, 306 S.W.3d 230, 244 (Tex. 2010) (footnote omitted).

198. *See* INS v. St. Cyr, 533 U.S. 289, 324 (2001) ("[D]eportation is not punishment for past crimes . . . ."); Flemming v. Nestor, 363 U.S. 603 (1960). There are, of course, serious arguments that deportation should be regarded as punishment under current doctrine. *See, e.g.*, Javier Bleichmar, *Deportation as Punishment: A Historical Analysis of the British Practice of Banishment and Its Impact on Modern Constitutional Law*, 14 GEO. IMMIGR. L.J. 115 (1999); Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305 (2000); *see also* Angela M. Banks, *Proportional Deportation*, 55 WAYNE L. REV. 1651 (2009); Stumpf, *supra* note 9.

point adhered to in *Padilla*.[199] Nevertheless, courts, prosecutors, and legislatures have taken deportation into account in the criminal process. Courts and prosecutors may treat a noncitizen differently than a citizen to avoid unwarranted deportation. If punishing noncitizens less than they deserve is unprincipled favoritism, the citizen who serves her full sentence has a just complaint. If leniency based on deportation is undeserved,[200] then it violates the important sentencing value of consistency, which requires that like cases be treated alike.[201]

However, there is a significant argument that deportation is properly considered in evaluating punishment. From a functional, utilitarian perspective, states have little reason to invest in reforming the future character and conduct of an individual who will not be part of society. A line of Alaska case law illustrates this point. In Alaska, the goals of sentencing are "rehabilitation, reinforcement of societal norms, isolation and deterrence."[202] The Alaska Supreme Court has held that trial courts should consider whether deportation would serve those ends "as well as incarceration would."[203] In another case, the Alaska Supreme Court upheld an unusually low sentence, noting that the fact that "the defendant was to be deported after he served [the sentence] will not erode society's belief that these burglaries were reflective of felonious anti-social behavior."[204] Similarly, Arizona requires functional literacy instruction for inmates with the exception of those "for whom the department receives an order of deportation."[205] The idea is that neither promoting rehabilitation nor preventing recidivism warrants spending scarce education funds on those who will be deported as soon as they leave prison.[206]

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199. Padilla v. Kentucky, 130 S. Ct. 1473, 1481 (2010) ("[R]emoval proceedings are civil in nature . . . .").

200. *See, e.g.*, United States v. Webster, 54 F.3d 1, 7 (1st Cir. 1995) ("The sentencing judge said, in substance, that Ravelo was not entitled to leniency simply because he faced deportation, for this would undermine the deterrent value of Ravelo's sentence. It is thus clear that the district court did not punish Ravelo more severely because of his alien status."); People v. Padilla, 564 N.Y.S.2d 307, 308 (App. Div. 1990) ("[D]efendant's status as an illegal alien, subject to deportation upon serving his sentence, does not warrant a reduction in sentence.").

201. *See, e.g.*, 18 U.S.C. § 3553(a)(6) (2006) (stating that a sentence should reflect "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct").

202. Dale v. State, 626 P.2d 1062, 1063–64 (Alaska 1980); *accord* 18 U.S.C § 3553(a)(2).

203. *Dale*, 626 P.2d at 1063–64; *see also* Resek v. State, No. 5665, 1983 WL 807718, at *3 n.6 (Alaska Ct. App. Jan. 12, 1983).

204. State v. Tucker, 581 P.2d 223, 226 (Alaska 1978).

205. ARIZ. REV. STAT. ANN. § 31-229(J)(1) (2002).

206. *See also* Villarreal v. State, No. 14-00-00948-CR, 2001 WL 1249329, at *2 (Tex. App. Oct. 18, 2001) ("Appellant also asserts that his counsel's performance was deficient in that he mentioned in his closing argument that appellant is from Mexico and will most likely be deported after he is released from the penitentiary. However, counsel's argument that appellant is an illegal alien and

The utilitarian argument will be completely unpersuasive to a citizen who must serve more time in prison or to a retributivist who contends that lawbreakers should get nothing less than the punishment they deserve.[207] However, the Court has long understood that deportation, though it is not punishment, is very much like punishment.

Deportation is frequently described using synonyms for punishment. The Court has called deportation "the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty."[208] It has also stated, "Although deportation is not technically a criminal punishment, it may visit great hardship on the alien."[209] Moreover, "deportation may result in the loss 'of all that makes life worth living.'"[210] The Court reaffirmed this idea in *Padilla*.[211]

The Court has also analogized deportation to the historical criminal punishments of "banishment or exile."[212] Expatriation[213] and banishment are no longer criminal punishments—not because they are no longer punitive,

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thus likely to be deported after serving his punishment was a plausible trial strategy in trying to induce the jury to impose a shorter sentence because appellant would not thereafter pose a threat to the community.").

207. *See, e.g.*, Dan Markel, *What Might Retributive Justice Be? An Argument for the Confrontational Conception of the Retributivism*, *in* RETRIBUTIVISM: ESSAYS ON THEORY AND POLICY 49 (Mark D. White ed., 2011).

208. Costello v. INS, 376 U.S. 120, 128 (1964) (quoting Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) (internal quotation marks omitted)).

209. Fiswick v. United States, 329 U.S. 211, 222 n.8 (1946) (citing Bridges v. Wixon, 326 U.S. 135, 147 (1945)).

210. *Id.* (citations omitted) (quoting Ng Fung Ho v. White, 259 U.S. 276, 284 (1922)); *see also* Galvan v. Press, 347 U.S. 522, 531 (1954) (noting that "the intrinsic consequences of deportation are so close to punishment for crime, it might fairly be said also that the *ex post facto* Clause, even though applicable only to punitive legislation, should be applied to deportation," but declining to do so based on precedent (footnote omitted)).

211. Padilla v. Kentucky, 130 S. Ct. 1473, 1481 (2010) ("We have long recognized that deportation is a particularly severe 'penalty' . . . .").

212. Delgadillo v. Carmichael, 332 U.S. 388, 391 (1947). The Court has explained:

> [F]orfeiture of citizenship and the related devices of banishment and exile have throughout history been used as punishment. In ancient Rome, "There were many ways in which a man might lose his freedom, and with his freedom he necessarily lost his citizenship also. Thus he might be sold into slavery as an insolvent debtor, or condemned to the mines for his crimes as *servus poenae*." Banishment was a weapon in the English legal arsenal for centuries, but it was always "adjudged a harsh punishment even by men who were accustomed to brutality in the administration of criminal justice."

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 n.23 (1963) (citations omitted); *see also, e.g.*, Boutilier v. INS, 387 U.S. 118, 132 (1967) (Douglas, J., dissenting) ("Deportation is the equivalent to banishment or exile. Though technically not criminal, it practically may be. The penalty is so severe that we have extended to the resident alien the protection of due process." (citation omitted)). *See generally* Wm. Garth Snider, *Banishment: The History of Its Use and a Proposal for Its Abolition Under the First Amendment*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 455 (1998).

213. That is, stripping a citizen of his or her status.

but because they are unconstitutional. In *Trop v. Dulles*,[214] the plurality held that that while capital punishment was a permissible sanction against a soldier who deserted in the face of the enemy in time of war, expatriation was cruel and unusual punishment under the Eighth Amendment. Later, the Court held that Congress simply had no power to expatriate citizens against their will as punishment or otherwise.[215]

Justice Jackson, writing for Justices Black and Frankfurter, offered one of the most explicit arguments that deportation for a crime was an aspect of the criminal process:

> We have said that deportation is equivalent to banishment or exile. Deportation proceedings technically are not criminal; but practically they are for they extend the criminal process of sentencing to include on the same convictions an additional punishment of deportation. If respondent were a citizen, his aggregate sentences of three years and a day would have been served long since and his punishment ended. But because of his alienage, he is about to begin a life sentence of exile from what has become home, of separation from his established means of livelihood for himself and his family of American citizens.[216]

At bottom, then, deportation is virtually identical to the historical punishments of banishment or exile, imposing a grievous loss on the individual experiencing it. The citizen will not be deported. The noncitizen, though not serving a full sentence if released early or if granted a concession in a plea bargain, must leave his or her home because of the criminal judgment. In this way, the citizen and noncitizen receive nonidentical but equivalent punishments. If the noncitizen defendant is both sentenced to a full term in prison and deported, then he has been subjected to harsher punishment than the citizen defendant,[217] thereby violating the central sentencing value of consistency.[218]

Though not punishment, deportation is very similar to things that are unquestionably punishment; it a quasi-punishment. American law often considers quasi-punishments for sentencing purposes.[219] Perhaps the major example

214. 356 U.S. 86 (1958).

215. Afroyim v. Rusk, 387 U.S. 253 (1967).

216. Jordan v. De George, 341 U.S. 223, 243 (1951) (Jackson J., dissenting) (footnote omitted).

217. *See* Jason Bent, Note, *Sentencing Equality for Deportable Aliens: Departures From the Sentencing Guidelines on the Basis of Alienage*, 98 MICH. L. REV. 1320 (2000).

218. *See supra* note 201.

219. For another example of something not technically criminal being treated as criminal, see *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 701 (1965), in which the Court applied the exclusionary rule to a forfeiture proceeding because "forfeiture is clearly a penalty for the criminal offense." *See also* Boyd v. United States, 116 U.S. 616, 634 (1886) (characterizing a forfeiture proceeding as "quasi criminal"). Many other nonimmigration cases apply heightened scrutiny or

is jail time credit. Pretrial detention, the Court has held, is not punishment.[220] Accordingly, many courts have held that there is no constitutional right to a setoff against a prison sentence for time spent in jail in advance of trial.[221] Yet, jail time credit is a universal or near-universal feature of sentencing in the United States.[222] The reason is simple: Being held in jail because one is charged with a crime is a deprivation nearly indistinguishable from being held in jail because one is convicted of a crime. Failing to account for time in jail would create an obvious injustice because those who could not pay or those who were denied bail would wind up serving more time compared to those who were able to make bail.[223] This is true even though there are differences between jail and prison, including the fact that pretrial detainees have not

substantive or procedural standards after concluding that a proceeding or statute is quasi-criminal. *See, e g.*, Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 432–34 (2001) (holding that punitive damages are quasi-criminal and therefore subject to heightened procedural requirements); M.L.B. v. S.L.J., 519 U.S. 102, 124 (1996) ("Nor may access to judicial processes in cases criminal or 'quasi criminal in nature,' turn on ability to pay." (quoting Mayer v. City of Chicago, 404 U.S. 189, 196 (1971))); Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499–500 (1982) (noting that "prohibitory and stigmatizing effect" of a "quasi-criminal" ordinance is relevant to a vagueness analysis); Little v. Streater, 452 U.S. 1, 16 (1981) (holding a fee requirement for a blood test in a quasi-criminal paternity action unconstitutional); Addington v. Texas, 441 U.S. 418, 431–33 (1979) (requiring a clear and convincing evidence standard for civil commitment, and discussing other quasi-criminal situations requiring the same standard); *In re* Ruffalo, 390 U.S. 544, 551–52 (1968) (describing disbarment as "quasi-criminal" and thus requiring notice); Restrepo v. McElroy, 369 F.3d 627, 635 n.16 (2d Cir. 2004) ("[D]eportation, like some other kinds of civil sanctions, combines an unmistakable punitive aspect with nonpunitive aspects."). *But see* Hicks *ex rel.* Feiock v. Feiock, 485 U.S. 624 (1988) (finding the civil–criminal divide critical).

220. Bell v. Wolfish, 441 U.S. 520, 535–36 (1979). *But see* Marc Miller & Martin Guggenheim, *Pretrial Detention and Punishment*, 75 MINN. L. REV. 335 (1990) (arguing that pretrial detention can be punishment for constitutional purposes).

221. *E.g.*, Vasquez v. Cooper, 862 F.2d 250 (10th Cir. 1988); Gray v. Warden of Mont. State Prison, 523 F.2d 989, 990 (9th Cir. 1975) ("The origin of the modern concept of pre-conviction jail time credit upon the term of the ultimate sentence of imprisonment is of legislative grace and not a constitutional guarantee."). The rule may be different when the jail time served plus the prison sentence add up to more than the maximum sentence. *See Vasquez*, 862 F.2d at 253 n.3. *See generally* Michael Meltsner, *Pre-Trial Detention, Bail Pending Appeal and Jail Time Credit: The Constitutional Problems and Some Suggested Remedies*, 3 CRIM. L. BULL. 618 (1967).

222. *See, e.g.*, 18 U.S.C. § 3585(b) (2006); Wade R. Habeeb, Annotation, *Right to Credit for Time Spent in Custody Prior to Trial or Sentence*, 77 A.L.R.3d 182 (1977).

223. *See* State v. Abernathy, 649 S.W.2d 285, 286 (Tenn. Crim. App. 1983) ("The legislature in its wisdom recognized an injustice between the person of means who could make bond and the person who could not and had to languish in jail."); *cf.* Hoff v. Wilson, 500 N.E.2d 1366 (Ohio 1986) (holding that because the legislature provided for jail time credit for hours spent on work release for those serving felony sentences, "[i]t would be illogical and unfair . . . to then conclude that the same credit should not apply to those . . . incarcerated for conviction of misdemeanor offenses"); Hill, *supra* note 47, at 611 ("There are many examples of defendants' [sic] being detained prior to trial many days or months, possibly even longer than the transgression against society would warrant, only to be found guilty and sentenced to jail for another period." (footnote omitted)).

yet been convicted and sentenced; therefore, they are unable to reevaluate their conduct in light of the judgment.

Another example is in the area of fines. The Guidelines allow credit against criminal fines for civil penalties beyond mere restitution arising from the same misconduct.[224] There is no real difference in severity or perception between being subjected to a $25,000 criminal fine for tax evasion and a $25,000 civil penalty for tax evasion. In each case the deprivation is virtually identical, and the social meaning of the judgment carries the same import—the defendant was found to have evaded taxes. That the judgments may differ in other respects (no term of imprisonment is available in a civil case, for example) does not change the fact that this aspect of the punishment is practically the same.

The ABA Criminal Justice Standards (Standards) generalize these ideas, providing that collateral sanctions, defined as legal deprivations that occur by operation of law as a result of the conviction, should be considered at sentencing. The Standards state that "[t]he legislature should authorize the sentencing court to take into account, and the court should consider, applicable collateral sanctions in determining an offender's overall sentence."[225] The comments explain that "Standard 19-2.4(a) requires a sentencing court to take into account applicable collateral sanctions in fashioning a package of sanctions at sentencing. . . . [T]he sentencing court should ensure that the totality of the penalty is not unduly severe and that it does not give rise to undue disparity."[226] Accounting for the reality of the legal consequences that result from conviction also furthers established principles of sentencing, such as proportionality and consistency.

To avoid systematic overpunishment of noncitizens, prosecutors and the courts consider deportation when charging and sentencing. However, the principle at stake is avoiding unfair disparity, not merely granting noncitizens leniency. Accordingly, if a prosecutor allows a defendant to participate in a diversion program or declines to charge a defendant with a particular offense, the bargain should include some alternative sanction or charge to ensure that the bargain is equivalent to what a similarly situated citizen would receive. Similarly, if a court imposes a particular sentence calculated to avoid deportation

224. U.S. SENTENCING GUIDELINES MANUAL, *supra* note 184, § 5E1.2(d) (requiring a court to consider, in calculating a fine, "(4) any restitution or reparation that the defendant has made or is obligated to make; (5) any collateral consequences of conviction, including civil obligations arising from the defendant's conduct"); *see also* VT. STAT. ANN. tit. 23, § 2307(C)(1)(b) (2007) (allowing waiver of certain assessments in consideration of "the collateral consequences of the violation").

225. STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS 19-2.4(a) (3d ed. 2004).

226. *Id.* at 19-2.4(a) cmt.

by, say, reducing the period of incarceration, it should increase some other aspect of the penalty by a proportional amount.[227]

This structure admittedly requires comparing the incommensurable. It is not obvious what sanction a court should impose on the Balloon Boy's mother to compensate for the fact that she received a misdemeanor plea when she may well have committed a felony. It is not obvious how many years or what percentage should be taken off of a sentence in consideration of the fact that the defendant will be deported upon release. But comparison of incommensurables is an intractable feature of sentencing. There is, for example, no objectively correct or mechanically determinable sentencing enhancement warranted by a prior conviction for robbery or because the victim was a child or elderly.[228] Similarly, defendants who are able to pay restitution[229] or a fine sometimes receive different outcomes than those unable to do so even though there is no precise incarceration value assignable to $1,000 paid to a victim or $100,000 paid to the State. Prosecutors and sentencing courts can only evaluate the facts of each case as best they can. Inevitably, different decisionmakers will ascribe different weight to a particular factor in a particular case.[230] Yet, considering generally relevant factors, even if imperfectly, will lead to more just sentences than ignoring them entirely.[231] Although some

227. Similarly, to the extent that a noncitizen is denied the opportunity for early release or a nonprison sentence solely because of his or her deportability, the noncitizen is being punished for something unrelated to culpability. The impact of his or her status, if any, is already accounted for by the unlawful entry aggravator. If someone is otherwise a good candidate for probation, but is sentenced to prison solely because of immigration status, then the sentence should be sufficiently brief to make it comparable in severity to those who did receive probation. It would be unfair for the individual to receive a substantially more onerous sentence based on a factor that does not go to culpability or desert.

228. That is, other than an arbitrary one, of course (the sentence could be increased by "one year" or "10 percent"), but that would work for immigration effects as well.

229. *See* 18 U.S.C. § 3553(a)(7) (2006) (including among the considerations for sentencing "the need to provide restitution to any victims of the offense"); Jeffrey F. Ghent, Annotation, *Construction and Effect of Statute Authorizing Dismissal of Criminal Action Upon Settlement of Civil Liability Growing Out of Act Charged*, 42 A.L.R.3d 315 (1972) (discussing misdemeanor compromise statutes).

230. Baird v. Davis, 388 F.3d 1110, 1114 (7th Cir. 2004) ("[The Supreme Court] has made clear that a sentencing court in balancing aggravating and mitigating circumstances bearing on the imposition of the death penalty is not required to give any fixed weight to any particular mitigating circumstance." (citing Harris v. Alabama, 513 U.S. 504, 512 (1995); Eddings v. Oklahoma, 455 U.S. 104, 112–15 (1982))).

231. Note that in this structure, immigration status can be both an aggravating and mitigating factor; that is, theoretically, a defendant can receive an aggravated sentence because he or she is undocumented but be released early because he or she is subject to deportation as undocumented. However, there is no logical or legal prohibition on a factor being both aggravating and mitigating, as the Supreme Court recognized in *Penry v. Lynaugh*, 492 U.S. 302 (1989). "[The defendant's] mental retardation and history of abuse is . . . a double edged sword: it may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future." *Id.* at 324. Similarly, being a public servant can be an aggravating factor if the crime involved taking advantage of

imprecision is inevitable, careful identification of the reasons for aggravation and mitigation can offer a basis for rational application of the principles.

The possibility of deportation will be of different weight depending on the circumstances. Clearly, the person entitled to the most consideration for loss of the ability to live in the United States is the person whose presence is otherwise lawful and who has substantial personal connections to the country.[232] This is the kind of person who the Court recognized might lose everything that makes life worth living; for this kind of person, deportation is substantial quasi-punishment. By contrast, someone who entered the country solely for purposes of committing the crime for which she was convicted does not have connections to the country that warrant consideration in the sentencing process.

More complicated is how to treat those without lawful status who are deportable for crimes. Arguably, they should be regarded as losing no interest that the sentencing court should consider. However, even someone without lawful status has various prospects for relief that are recognized by the Immigration and Nationality Act.[233] Immigration law provides some means for those here without authorization to regularize their status. Thus, an undocumented person deported for a crime loses not only the possibility of evading detection from the authorities, which is entitled to no weight, but also foregoing the possibility of legal avenues to regularize his status.[234] Accordingly, a longterm resident with substantial family connections is entitled to recognition of the consequences of his deportation during sentencing regardless of whether his presence is authorized.

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that status; it could also reasonably be considered a mitigating factor. *See* Carissa Byrne Hessick, *Why Are Only Bad Acts Good Sentencing Factors?*, 88 B.U. L. REV. 1109 (2008).

232. *Cf.* Landon v. Plasencia, 459 U.S. 21, 32 (1982) ("[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly.").

233. Even though someone is deportable, the Immigration and Nationality Act permits a variety of methods to allow him or her to stay in the United States. *See* Gabriel J. Chin & Marc Miller, *The Unconstitutionality of State Regulation of Immigration Through Criminal Law*, 61 DUKE L.J. (forthcoming 2011), *available at* http://papers.ssrn.com/sol3/paper.cfm?abstract_id=1648685.

234. In *Plyler v. Doe*, 457 U.S. 202 (1982), the Court held that states could not deny a K–12 education to undocumented children:

> To be sure, like all persons who have entered the United States unlawfully, these children are subject to deportation. But there is no assurance that a child subject to deportation will ever be deported. An illegal entrant might be granted federal permission to continue to reside in this country, or even to become a citizen. In light of the discretionary federal power to grant relief from deportation, a State cannot realistically determine that any particular undocumented child will in fact be deported until after deportation proceedings have been completed. It would of course be most difficult for the State to justify a denial of education to a child enjoying an inchoate federal permission to remain.

Id. at 226 (citations omitted).

It is possible for a defendant to get a benefit consideration of the possibility of deportation at sentencing and then be released early for deportation, thereby effectively double-counting the deportation. A rational sentencing system should systematically evaluate this factor. Courts should grant credit at the time of sentencing, when they can consider this factor as it applies based on the facts of the case and in the context of the other sentencing factors.

CONCLUSION

Padilla v. Kentucky is a landmark case whose reverberations will be felt for years. But the Court's understanding of the importance of a client's immigration status on the criminal case was much too narrow. Immigration status is now considered in many jurisdictions at almost every stage of the criminal process: charging, plea, trial, sentencing, and during service of the sentence through early release for deportation. The criminal justice system and the immigration system pervasively interact.

Given the practical importance of immigration status to the criminal case, a rational and fair criminal justice system has two choices: either to reduce or eliminate the criminal justice effects of immigration status, or to consciously structure them and address them deliberately, like other facts and circumstances important to the criminal case. This Article proposes that the best approach is not to decouple immigration from the criminal process, but to recognize and structure the effect of immigration status on criminal prosecutions. Many of the connections are justified as a matter of principle; immigration status affects the criminal process legitimately. Deportation, because of its close relationship to the historical punishments of banishment and exile, is a quasi-punishment legitimately considered in plea bargaining, charging, and sentencing, either to avoid deportation when it is unwarranted, or to mitigate a sentence when it will be followed by deportation.

However, there is an inevitable risk that immigration status will be used as a means of injecting discriminatory animus into the criminal proceeding, and the doctrine should be structured to guard against this. In particular, bail, impeachment, and sentencing decisions should turn on immigration status or entry without authorization only if there is a clear basis for it. The current practice in many jurisdictions is not connected closely enough to the reasons making immigration status relevant and, in these jurisdictions, disadvantages based on immigration status should be imposed in a more restrained fashion.