CRIMINAL JUSTICE IN AN ERA OF MASS DEPORTATION: REFORMS FROM CALIFORNIA

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After a sustained period of hypercriminalization, the United States criminal justice system is undergoing reform. Congress has reduced federal sentencing for drug crimes, prison growth is slowing, and some states are even closing prisons. Low-level crimes have been removed from criminal law books, and attention is beginning to focus on long-neglected issues such as bail and criminal court fines. Still largely overlooked in this era of ambitious reform, however, is the treatment of immigrants in the criminal justice system. An unprecedented focus on immigration enforcement targeted at "felons, not families" has resulted in a separate system of punitive treatment reserved for noncitizens, which includes crimes of migration, longer periods of pretrial detention, harsher criminal sentences, and the almost certain collateral consequence of lifetime banishment from the United States. For examples of state-level solutions to this predicament, this Essay turns to a trio of bold criminal justice reforms from California that (1) require prosecutors to consider immigration penalties in plea bargaining; (2) change the state definition of "misdemeanor" from a maximum sentence of a year to 364 days; and (3) instruct law enforcement agencies to not hold immigrants for deportation purposes unless they are first convicted of serious crimes. Together, these new laws provide an important window into how state

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criminal justice systems could begin to address some of the unique concerns of noncitizen criminal defendants.

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INTRODUCTION

Immigration enforcement in the United States is now intimately tied to the criminal justice system. More immigrants than ever before are held in prisons, jails, and federal detention facilities, often for prolonged periods of time and under adverse conditions.[1] Under guidelines set by the Obama administration, noncitizens with criminal convictions have the highest priority for deportation,[2] and a record number of immigrants have been deported.[3] Criminal prosecutions for illegally entering the United States now constitute almost half of all federal criminal convictions,[4] and noncitizens are more likely than citizens to be detained pending their criminal trials.[5]

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1. John F. Simanski, *Immigration Enforcement Actions: 2013*, U.S. Dep't Homeland Security Ann. Rep. (Sept. 2014), https://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf (reporting a total of 440,557 immigrants held in immigration detention during fiscal year 2013).

2. Memorandum from John Morton to all ICE Employees, Civil Immigration Enforcement: Priorities for Apprehension, Detention, and Removal of Aliens (Mar. 2, 2011), *available at* http://www.ice.gov/doclib/foia/prosecutorial-discretion/civil-imm-enforcement-priorities_app-detn-reml-aliens.pdf [hereinafter Morton Memo].

3. Simanski, *supra* note 1, at 6.

4. Immigration crimes constituted 43 percent of criminal offenses disposed of by federal district and magistrate judges in 2015. Thomas F. Hogan, *Judicial Business of the United States Courts: 2015*, Annual Report of the Director, Admin. Office of the U.S. Cts., tbl. D-4 (2015), http://www.uscourts.gov/statistics/ table/d-4/statistical-tables-federal-judiciary/2015/06/30 (reporting that during the twelve-month period ending June 30, 2015, immigration offenses were 21,124 out of 81,179 criminal cases disposed of by district courts); *id.* at tbl. M-2, http://www.uscourts.gov/statistics/table/m-2/judicial-business/2015/09/30 (reporting that during the twelve-month period ending September 30, 2015, immigration offenses were 49,844 out of 85,639 petty offenses disposed of by magistrate judges).

5. For example, from 2002 to 2008, 98 percent of all individuals charged with immigration crime were ordered detained in federal criminal courts—higher than for any other category of crime, including violent crimes. Thomas H. Cohen, *Pretrial Detention and Misconduct in Federal District Courts, 1995–2010*, Bureau of Justice Statistics, U.S. Dep't of Justice 1 (Feb. 2013), http://www.bjs.gov/content/pub/pdf/pdmfdc9510.pdf. Immigrants in state courts may also be more likely to be detained pretrial due to the use of

This massive and expanding system for punishing immigrants has also resulted in racial profiling of Latinos by police[6] and has made Latinos the largest racial or ethnic group sentenced in federal courts today.[7]

At the same time, the criminal justice system is undergoing an unprecedented wave of decriminalization. In 2014, Congress slashed federal sentencing for drug crimes,[8] and the Department of Justice announced a historic clemency initiative to commute the sentences of inmates condemned under the stringent punishment practices of years past.[9] Prison growth is slowing, and some states are even closing prisons.[10] Legislators have begun to remove low-level crimes from criminal

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immigration detainers and state pretrial detention practices. Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. Rev. 1126, 1149–51 (2013).

6. *See, e.g.*, Trevor Gardiner II & Aarti Kohli, The C.A.P. Effect: Racial Profiling in the ICE Criminal Alien Program (Sept. 2009), https://www.law.berkeley.edu/files/ policybrief_irving_0909_v9.pdf (finding that Latinos comprise 93 percent of individuals taken into custody after local arrests, but are only 77 percent of the undocumented population).

7. Michael T. Light, *The New Face of Legal Inequality: Noncitizens and the Long-Term Trends in Sentencing Disparities Across U.S. District Courts, 1992–2009*, 48 L. & Soc'y Rev. 447, 467 (2014). *See also* Amada Armenta, *Racializing Crimmigration: Structural Racism, Colorblindness and the Institutional Production of Immigrant Criminality*, Soc. of Race & Ethnicity, online first (2016) (arguing that immigration enforcement is a "racial project" that subordinates Latinos); Rachel E. Rosenbloom, *Policing Sex, Policing Immigrants: What Crimmigration's Past Can Tell Us About Its Present and Its Future*, 104 Cal. L. Rev. 149, 153 (2016) (revealing how the current "crimmigration" system relies on over-policing of communities of color to implement a mass deportation regime); Yolanda Vázquez, *Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law into the Criminal Justice System*, 54 How. L.J. 639, 665 (2011) (discussing the "impact that crimmigration has had on Latinos").

8. U.S. Sentencing Comm'n, Policy Profile, Sensible Sentencing Reform: The 2014 Reduction of Drug Sentences 1–2 (2014), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/backgrounders/profile_2014_drug_amendment.pdf.

9. At a press conference announcing the initiative, Former Deputy Attorney General James M. Cole explained, "For our criminal justice system to be effective, it needs to not only be fair; but it also must be perceived as being fair. These older, stringent punishments that are out of line with sentences imposed under today's laws erode people's confidence in our criminal justice system." U.S. Dep't of Justice, Clemency Initiative (Apr. 23, 2014), https://www.justice.gov/pardon/clemency-initiative.

10. *See* Joan Petersilia, *Realigning Corrections, California Style*, 664 Annals Am. Acad. Pol. & Soc. Sci. 8 (2016) (describing a "momentous turnaround" in punitive criminal justice policies).

law books,[11] prosecutors are emphasizing the importance of being "smart on crime,"[12] and attention of activists and academics has begun to focus on long-neglected issues such as bail and criminal court fines.[13] A vibrant new movement of criminal defense lawyers promises to revitalize some of the most beleaguered public defense systems in the country.[14] Criminal justice, it seems, is experiencing a watershed moment.[15]

These two opposing trends—the increasingly punitive treatment of immigrants and the gradual scaling back of the criminal justice system—are on a collision course. Indeed, President Barack Obama has made his

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11. *See* Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223 (2007); Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587 (2012).

12. *See generally* KAMALA D. HARRIS, SMART ON CRIME (2009).

13 For powerful examples of advocacy on these issues, see JUSTICE POLICY INSTITUTE, BAIL FAIL: WHY THE U.S. SHOULD END THE PRACTICE OF USING MONEY FOR BAIL (Sept. 2012), http://www.justicepolicy.org/uploads/justicepolicy/documents/bailfail.pdf (revealing how bail operates to keep poor persons in jail who do not pose a danger or a flight risk); LAWYERS' COMMITTEE FOR CIVIL RIGHTS OF THE SAN FRANCISCO BAY AREA, NOT JUST A FERGUSON PROBLEM: HOW TRAFFIC COURTS DRIVE INEQUALITY IN CALIFORNIA (2015), http://www.lccr.com/wp-content/uploads/Not-Just-a-Ferguson-Problem-How-Traffic-Courts-Drive-Inequality-in-California-4.8.15.pdf. (documenting the harm that fines and fees imposed by traffic courts impose on poor and minority communities in California). Scholars have also begun to examine the legal underpinnings of these underexplored areas of the criminal justice system. *See, e.g.,* Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CAL. L. REV. 277 (2014); Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. (forthcoming 2017); Neil L. Sobol, *Charging the Poor: Criminal Justice Debt & Modern-Day Debtors' Prisons*, 75 MD. L. REV. 486 (2016).

14. Jonathan Rapping, founder of the nonprofit organization Gideon's Promise, has written about his vision for training the next generation of public defenders. Jonathan A. Rapping, *You Can't Build on Shaky Ground: Laying the Foundation for Indigent Defense Reform Through Values-Based Recruitment, Training, and Mentoring*, 3 HARV. L. & POL'Y REV. 161 (2009).

15. In referring to this set of reforms as a watershed moment, this Essay refrains from weighing in on the important debate about whether these changes will ultimately constitute a true paradigm shift. Rather, the point here is simply to call attention to the striking confluence of current efforts to rethink key components of the American criminal justice system. For thoughtful commentary questioning the robustness of such reforms, see MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS (2015) (analyzing the shortcomings of the dominant approaches to prison reform); Katherine Beckett et al., *The End of an Era? Understanding the Contradictions of Criminal Justice Reform*, 664 ANNALS AM. ACAD. POL. & SOC. SCI. 238 (2016) (arguing that current reforms should be understood as a "modification of the way punishment is conceived, discussed, and ultimately enacted").

conflicting messages clear, reciting in an address to the NAACP that "mass incarceration makes our entire country worse off, and we need to do something about it,"[16] while simultaneously telling the American public that his administration will seek out and deport "felons, not families."[17] A growing consensus that mass incarceration makes society worse off has not yet spread to the parallel problem of mass and disproportionate detention, prosecution, and punishment of immigrants.[18]

A nascent movement in California, however, has begun to address this issue of criminal justice for noncitizens, in large part due to the tireless advocacy work of immigrant rights groups.[19] This Essay features the results of their work by examining a series of state legislative reforms designed to address the criminal justice disadvantage of immigrants charged with crimes.[20]

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16. *See* David Hudson, *President Obama: "Our Criminal Justice System Isn't as Smart as It Should Be,"* WHITE HOUSE BLOG (July 15, 2015, 1:12 PM), https://www.whitehouse.gov/blog/2015/07/15/president-obama-our-criminal-justice-system-isnt-smart-it-should-be.

17. President Obama further remarked that he would deport "[c]riminals, not children. Gang members, not a mom who's working hard to provide for her kids." President Barack Obama, Remarks by the President in Address to the Nation on Immigration (Nov. 20, 2014), http://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration.

18. In April 2016, the President released a new report calling for further decreases in incarceration and other reforms to "make our criminal justice system more effective, efficient, and equitable." EXEC. OFFICE OF THE PRESIDENT, ECONOMIC PERSPECTIVES ON INCARCERATION AND THE CRIMINAL JUSTICE SYSTEM (Apr. 2016), *available at* https://www.whitehouse.gov/sites/default/files/page/files/20160423_cea_incarceration_criminal_justice.pdf. Notably, the report did not call for a reduction in the deportation of noncitizens convicted of crimes.

19. The California-based nonprofit organizations that have supported and/or sponsored the various bills discussed in this Essay include: American Civil Liberties Union of California, Asian Americans Advancing Justice–California, California Immigrant Policy Center, Coalition for Humane Immigrant Rights of Los Angeles, Immigrant Legal Resource Center, Mexican American Legal Defense and Educational Fund, and National Day Laborer Organizing Network.

20. A range of legal scholars have commented on the constitutionality and function of pro-immigrant state and local initiatives, such as allowing undocumented immigrants to qualify for in-state university tuition and state-issued driver's licenses. *See, e.g.*, Stella Burch Elias, *The New Immigration Federalism*, 74 OHIO ST. L.J. 703, 705 (2013) (arguing that under current constitutional doctrine there is "ample opportunity for different varieties of state and local engagement with noncitizen residents—some of which will be novel and some of which will involve the further development or redirection of preexisting laws and policies"); Peter L. Markowitz, *Undocumented No More: The Power of State Citizenship*, 67

This Essay proceeds in two parts. Part I explores the increasingly punitive treatment of noncitizens in the criminal justice system and the ways in which this treatment can result in unequal outcomes for noncitizen defendants. It does so by introducing several key aspects of the immigration-criminal convergence that have accentuated these disparate outcomes: the expansion of deportation control, the rising power of prosecutors in plea bargaining, and the growth of federal enforcement efforts linked to the criminal justice system, particularly local jails.

Part II discusses innovative California reforms that promise to ameliorate the plight of noncitizens entangled in the criminal justice system. Specifically, it focuses on three legislative fixes: (1) a requirement that prosecutors consider the adverse immigration consequences of a criminal conviction in reaching a just case resolution; (2) a one-day reduction in the maximum sentence for state misdemeanors that reduces collateral deportations; and (3) a mandate that localities refuse to honor federal immigration requests to transfer low-level arrestees into immigration custody for deportation. Each of these state laws indirectly challenges existing federal immigration enforcement practices. As Part II explains, these California reforms are designed to produce more "immigration-safe" plea bargains, fewer convictions resulting in deportation, and fewer transfers of jailed immigrants into immigration custody.

Although this Essay addresses the American context, scholars have documented similar trends of increasing criminalization of migration control in countries around the world.[21] The California reforms therefore present

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STAN. L. REV. 869 (2015) (detailing ways in which states can "advance inclusive constructions of state citizenship"); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 571–72, 609–10, 615–17 (2008) (arguing that federal, state, and local authorities all contribute to immigrant assimilation).

21. For a sampling of scholarship exploring a similar merger of criminal and immigration enforcement outside the United States, see Katja Franko Aas, *Bordered Penality: Precarious Membership and Abnormal Justice*, 16 PUNISHMENT & SOC'Y 520 (2014); Ana Aliverti, *Exploring the Function of Criminal Law in the Policing of Foreigners: The Decision to Prosecute Immigration-Related Offenses,* 21 SOC. & LEGAL STUD. 511 (2012); Mary Bosworth & Mhairi Guild, *Governing Through Migration Control: Security and Citizenship in Britain*, 48 BRIT. J. CRIMINOLOGY 703 (2008); Alessandro De Giorgi, *Immigration Control, Post-Fordism, and Less Eligibility: A Materialist Critique of the Criminalization of Immigration Across Europe*, 12 PUNISHMENT & SOC'Y. 147 (2010); Maria João Guia & João Pedroso, *Institutional Perceptions of Internal Security on the Relationship between "Sensitive Urban Zones" and Immigrant Criminality*, 5(2) LAWS 16 (2016).

a provocative approach for study and innovation. Future research should endeavor to deepen our understanding of how citizenship operates in today's criminal justice system as well as to identify how altering state and local laws and practices might ameliorate some of the harshest aspects of the criminal-immigration convergence.

I. IMMIGRANTS IN THE CRIMINAL JUSTICE SYSTEM

Over the past two decades, the integration of immigration enforcement and criminal justice has become so pronounced that it is now referred to by terms such as "border criminology"[22] or "crimmigration law."[23] This relentless merger has produced considerable distortion in the functioning of the criminal justice system. Even worse, the overlapping realms have fostered an inferior system of rights for immigrants by importing the punitive apparatus of the criminal justice system, while rejecting its protective features, such as appointed counsel and other constitutional protections.[24] The end result is what David Sklansky has called a system in which tools can be used in an "ad hoc" and "instrumental" way that is susceptible to discriminatory application with little public accountability.[25] This Part discusses three structural features of the United States criminal and immigration systems that have contributed to the "crimmigration" phenomenon: expansion of deportation, prosecutorial power in criminal plea bargaining, and reliance on local jails for immigration enforcement activities.

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22. *See* Border Criminologies, UNIVERSITY OF OXFORD, https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies (defining "border criminologies" as "the emerging field of inquiry into border control within criminology").

23. *See generally* CÉSAR CUAUHTÉMOC GARCÍA HERNÁNDEZ, CRIMMIGRATION LAW (2015); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006).

24. *See, e.g.*, Jennifer M. Chacón, *Unsecured Borders: Immigration Restrictions, Crime Control and National Security*, 39 CONN. L. REV. 1827 (2007); Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th "Pale of Law,"* 29 N.C. J. INT'L L. & COM. REG. 639 (2004); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469 (2007).

25. David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157, 158 (2012).

A. Expansion of Deportation

The first central feature of the criminal-immigration convergence is the increasing severity of deportation law. Changes in federal law passed since the 1990s have expanded the legal grounds for deportation, particularly grounds based on criminal convictions. At the same time, many earlier forms of discretionary relief were eliminated.[26]

Before these changes, immigration judges could weigh the equities of an immigrant's situation to determine whether a conviction should strip his or her lawful status. In contrast, now immigration judges often cannot change the course of the deportation, even when presented with sympathetic mitigating factors such as long-term residence in the United States or family members that would be harmed by the immigrant's deportation. Furthermore, other shifts in immigration law and practice have resulted in a dramatic rise in what Shoba Wadhia has artfully termed "speed deportations," in which immigrants are quickly deported without ever seeing an immigration judge to petition for relief.[27]

Along with the proliferation of grounds for deportation has come a parallel growth in the grounds for mandatory detention. Today, many individuals convicted of crimes are not only subject to almost certain deportation, but they are also held in immigration custody during the entirety of the deportation process.[28] Sometimes these detentions can be so prolonged that immigrants give up and do not pursue relief, even if it may be available.[29]

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26. *See generally* Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1889 (2000).

27. *See* Shoba Sivaprasad Wadhia, *The Rise of Speed Deportation and the Role of Discretion*, 5 COLUM. J. RACE & L. 1 (2014) (discussing the increase in practices such as reinstatements of removal and expedited removals). *See also* Jennifer Lee Koh, *Removal in the Shadows of Immigration Court*, 90 S. CAL. L. REV. (forthcoming 2017) (referring to the rise of such practices as a "shadow" form of deportation that takes place outside the immigration court).

28. *See* César Cuauhtémoc García Hernández, *Naturalizing Immigration Imprisonment*, 103 CAL. L. REV. 1449, 1455 (2015) (arguing that imprisonment has become "deeply entrenched in immigration policymaking"); Emily Ryo, *Detained: A Study of Immigration Bond Hearings*, 50 L. & SOC'Y REV. 117 (2016) (showing how immigration judges ruling in immigration bond hearings do so in ways that can reinforce social inequality by placing emphasis on immigrant criminality).

29. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PA. L. REV. 1, 53, tbl. 3 (2015) (finding that only 3 percent of pro se immigrants in detention pursue relief from deportation).

And, despite increased attention given to the possibility of prosecutorial discretion, research has found that this type of discretion is rare in the deportation context, particularly for immigrants held in detention. For example, in fiscal year 2012, only fifty detained removal cases were terminated or closed based on an exercise of prosecutorial discretion.[30] Juliet Stumpf argues that immigration detention is best understood as a "helpmate" that "drives deportation."[31] Imprisonment in detention centers works together with rigid detention laws to make it more likely that immigrants targeted for deportation concede to their own banishment.

Legal scholars have called into question the logic of deportation without any room for judicial discretion. As Michael Wishnie points out, the principle of proportionality requires that "a sanction should not be excessive in relation to the gravity of an offense."[32] Yet, in immigration law, deportation is the only available sanction. Deportation punishes immigrants that come into contact with the criminal justice system by depriving them of their membership to United States society—a process that Daniel Kanstroom characterizes as a form of "post-entry social control."[33]

Together, changes in law and practice have resulted in an immigration system designed to maximize its enforcement potential. This inflexibility is most acute when immigrants are charged with removal based on crimes. The next section explores how this reality makes criminal prosecutors central figures in the deportation process.

B. Prosecutorial Power in Plea Bargaining

A second prominent feature of the criminal-immigration convergence is the concentration of power in the American prosecutor.[34] Under current

30. Ingrid V. Eagly, *Remote Adjudication in Immigration*, 109 Nw. U. L. Rev. 933, 974 & n.189 (2015). Nina Rabin has argued that the culture of immigration enforcement that tends to "view all immigrants as criminal threats" may contribute to this lack of prosecutorial discretion on the ground. Nina Rabin, *Victims or Criminals? Discretion, Sorting, and Bureaucratic Culture in the U.S. Immigration System*, 23 S. Cal. Rev. L. & Soc. Just. 195, 196 (2014).

31. Juliet P. Stumpf, *Civil Detention and Other Oxymorons*, 40 Queens L.J. 55 (2015).

32. Michael J. Wishnie, *Immigration Law and the Proportionality Requirement*, 2 UC Irvine L. Rev. 415, 416 (2012).

33. Daniel Kanstroom, *The Right to Deportation Counsel in* Padilla v. Kentucky*: The Challenging Construction of the Fifth-and-A-Half Amendment*, 58 UCLA L. Rev. 1461, 1465 (2011).

34. *See generally* Angela J. Davis, Arbitrary Justice: The Power of the American Prosecutor (2007).

United States immigration laws, even pleas to relatively minor crimes can result in deportation.[35] Deportation is thus often referred to as a "collateral consequence" of entering into a plea bargain with the prosecutor.[36] For many noncitizen defendants, the fact of banishment from the United States is the most severe aspect of the punishment.

The close nexus between deportation and conviction has made the guilty plea process particularly crucial for noncitizens. Indeed, the plea bargaining model of adjudication is how almost all criminal cases in the United States are resolved.[37] A remarkable 97 percent of federal cases and 94 percent of state cases end in plea bargains.[38] For noncitizens, aspects of the bargain struck with the criminal prosecutor, such as the precise conduct pled to and the resulting sentence, will often be determinative in immigration court.

In 2010, the United States Supreme Court acknowledged in *Padilla v. Kentucky* that deportation's "close connection to the criminal process" makes it "uniquely difficult to classify as either a direct or collateral consequence."[39] As a result, the Court concluded that the Sixth Amendment imposes an obligation on criminal defense counsel to advise noncitizens of the potential immigration consequences of a guilty plea.[40] This duty extends to attempting to mitigate immigration consequences by negotiating with the prosecutor to achieve an immigration-neutral plea that will not result in deportation.

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35. *See generally* Jordan Cunnings, *Nonserious Marijuana Offenses and Noncitizens: Uncounseled Pleas and Disproportionate Consequences*, 62 UCLA L. Rev. 510 (2015) (documenting how even a minor marijuana conviction obtained without the advice of counsel can result in deportation).

36. "Collateral consequences," including the immigration consequence of deportation, are traditionally distinguished from "direct consequences" of a criminal conviction or guilty plea, such as a period of incarceration, supervision, or a fine. Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 Cornell L. Rev. 697, 698 (2002).

37. For a discussion of how plea bargaining became the dominant mode of adjudication in the United States, see George Fisher, Plea Bargaining's Triumph: A History of Plea Bargaining in America (2003).

38. Lafler v. Cooper, 132 S. Ct. 1376, 1388 (2012) (finding that a criminal defendant has a Sixth Amendment right to assistance of counsel during pretrial negotiations).

39. Padilla v. Kentucky, 130 S. Ct. 1473, 1482 (2010) (holding that a defense attorney's failure to advise his client of the immigration consequence of a guilty plea falls below the minimum standard for effective counsel).

40. *Id.*

Despite the Supreme Court's sound logic in *Padilla*, prosecutors have not traditionally considered immigration penalties in the plea bargaining context. A 2011 national survey of prosecutor's offices found that the majority had no written office policy that mentioned immigration status or immigration consequences.[41] As National District Attorneys Association president Robert Johnson explained, this lack of guidance on how to consider deportation in plea bargaining is in part due to the fact that prosecutors do not "control the whole range of restrictions and punishment imposed on the offender."[42] It also reflects the assumption that statutory penalties "fit the crime," and therefore prosecutors should worry only about the conduct, and not about the result at sentencing and beyond.[43]

In sum, the centrality of plea bargaining in the criminal justice system makes criminal prosecutors what Stephen Lee has aptly termed "gatekeepers" of the immigration removal system.[44] This gatekeeper role is further ensured by the federal government's explicit discretionary decision to prioritize the deportations of those convicted of crimes.[45]

C. Federal Immigration Enforcement in Local Jails

A third central feature of the merger of immigration and crime control is the concentration of deportation efforts on those arrested and held in local jails. In 2008, this strategy became evident nationwide when the federal government began an immigration enforcement program known as Secure Communities.[46] Dubbed "S-Comm" in the popular media, the program explicitly linked immigration enforcement to the biometric information

41. Eagly, *supra* note 5, at 1152 & tbl. 1.

42. Robert M.A. Johnson, *Message from the President: Collateral Consequences*, THE PROSECUTOR, 5 May–June 2001.

43. *Id.*

44. Stephen Lee, *De Facto Immigration Courts*, 101 CAL. L. REV. 553, 608 (2013) (demonstrating that *Padilla* "increased the ability of prosecutors to act as gatekeepers within the larger [immigration] removal system"). *See also* Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L.J. 1197 (2016) (arguing that "prosecutors have powerful incentives to 'prosecute' collateral consequences—meaning that they at times use their vast and unreviewable discretion over the criminal justice system to shape civil outcomes").

45. Morton Memo, *supra* note 2.

46. For a discussion of Secure Communities and other initiatives that "enmesh state and local police in immigration enforcement," see Anil Kalhan, *Immigration Policing and Federalism Through the Lens of Technology, Surveillance, and Privacy*, 74 OHIO ST. L.J. 1105, 1126–31 (2013).

gathered at the point of arrest by local sheriffs and police. The program's basic operational principle is to rely on the fingerprints collected by local jails in booking suspects. These fingerprint data are reviewed by federal immigration authorities, who determine whether the arrestee is subject to possible deportation.

Secure Communities was promoted by the federal government as a crime-fighting program that would make communities safer by deporting serious criminals. However, in practice, most immigrants who were deported had convictions for low-level crimes, or no record of conviction at all.[47] Moreover, critics found that the program failed to reduce crime rates.[48]

Secure Communities met extensive public resistance and became a focus of organizing efforts by immigrant rights groups. By 2014, more than 350 localities had ended or reduced their participation in the program.[49] In the face of mass resistance, Department of Homeland Security Secretary Jeh Johnson conceded that the "very name" of the Secure Communities program "has become a symbol for general hostility toward the enforcement of our immigration laws."[50] In late 2014, federal authorities announced that a new program—the Priority Enforcement Program (PEP)—would replace Secure Communities.[51]

The PEP initiative has many of the same features as Secure Communities.[52] Most fundamentally, it continues to rely on biometric data collected

47. Chris Strunk & Helga Leitner, *Redefining Secure Communities*, The Nation (Dec. 21, 2011), http://www.thenation.com/article/redefining-secure-communities/ (reporting that "54 percent of immigrants processed through the program were guilty of committing a misdemeanor offense or were never charged with a crime").

48. *See, e.g.*, Adam Cox & Thomas J. Miles, *Does Immigration Enforcement Reduce Crime? Evidence from "Secure Communities,"* 57 J.L. & Econ. 937 (2014); Charis E. Kubrin, *Secure or Insecure Communities?: Seven Reasons to Abandon the Secure Communities Program*, 13 Criminology & Pub. Pol'y 323 (2014); Elina Treyger et al., *Immigration Enforcement, Policing, and Crime: Evidence from the Secure Communities Program*, 13 Criminology & Pub. Pol'y 285 (2014).

49. Jerry Markon, *DHS Deportation Program Meets with Resistance*, Wash. Post, Aug. 3, 2015, https://www.washingtonpost.com/politics/dhs-finds-resistance-to-new-program-to-deport-illegal-immigrants/2015/08/03/4af5985c-36d0-11e5-9739-170df8af8eb9_story.html.

50. *See* Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., to Thomas S. Winkowski et al., Secure Communities 1 (Nov. 20, 2014), *available at* https://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf [hereinafter Secure Communities Memo].

51. *Id.* at 3. *See also* U.S. Immigration & Customs Enforcement, Priority Enforcement Program, https://www.ice.gov/pep.

at the point of arrest and prioritizes individuals for removal who fall within certain categories.[53] However, PEP does make several important changes. For example, it acknowledges that localities may opt out of participating in the program. In addition, PEP purports to require officials to seek transfer of an immigrant only if the immigrant has first been convicted of a crime that falls within the agency's priorities.[54] This change allows the criminal justice system to complete its process before any transfer into immigration custody is pursued. Finally, PEP implements a "notification request" system whereby local officials may inform immigration authorities at least forty-eight hours before immigrants are scheduled to be released from criminal custody.[55] This new system of notification prior to release could reduce the constitutionally suspect practice of holding immigrants beyond their normal point of release to facilitate transfer into immigration detention.[56]

Despite these changes, immigration enforcement under PEP remains tied to the criminal justice system and can continue to sweep in individuals convicted of low-level crimes. For instance, the creation of a new procedure—known as the Request for Voluntary Transfer or Form I-247X—now facilitates the transfer of immigrants from local jails into immigration detention even when they do not have criminal convictions, as required under PEP.[57] In this and other ways, federal immigration

52. For a helpful comparison of PEP and Secure Communities, see *Priority Enforcement Program: Why 'PEP' Doesn't Fix S-Comm's Failings*, Nat'l Immigr. L. Ctr. (June 2015), https://www.nilc.org/issues/immigration-enforcement/pepnotafix/.

53. Secure Communities Memo, *supra* note 50, at 2.

54. *Id.*

55. Dep't Homeland Sec., Form I-247 N: Request for Voluntary Notification of Release of a Suspected Priority Alien (May 2015), https://www.ice.gov/sites/default/files/documents/Document/2016/I-247N.PDF.

56. *See generally* Christopher N. Lasch, *Federal Immigration Detainers after Arizona v. United States*, 46 Loy. L.A. L. Rev. 629, 696–97 (2013) (arguing that the federal detainer process "routinely appears to result in warrantless investigatory arrests").

57. Dep't Homeland Sec., Form I-247X: Request for Voluntary Transfer (Oct. 2015), https://www.ice.gov/sites/default/files/documents/Document/2016/I-247X.PDF. *See generally* Stephen Dinan, *Obama Expands ICE Powers to Pursue Illegal Immigrants for Deportation, Angers Activists*, Wash. Times, Dec. 1, 2015, http://www.washingtontimes.com/news/2015/dec/1/obama-expands-ice-powers-to-pursue-illegal-immigra/?page=all (explaining that Immigration and Customs Enforcement (ICE) officials have begun to use Form I-247X to transfer into immigration custody non-PEP priority immigrants, such as recent border crossers, overstays, and individuals who have not been convicted of a crime).

practices continue to supply de facto authority to local police and prosecutors to structure their criminal priorities in ways that can and do shape immigration enforcement outcomes on the ground.

II. LESSONS FOR REFORM FROM CALIFORNIA

As Part I has shown, the federal immigration enforcement regime has a number of institutional design features that have resulted in its intimate connection with criminal adjudication. Immigration law has been stripped of discretionary forms of relief for immigrants with certain types of convictions. This reality places considerable power in the hands of criminal prosecutors to determine whom to charge, select among a menu of charges, and influence sentencing outcomes. Finally, the linking of the federal government's enforcement apparatus to the booking of suspects into local jails further cements the Executive's policy choice to center immigration enforcement efforts within the criminal justice system.

California is an especially important state for experimenting with reform. The state's population of over ten million immigrant residents is greater than that of any other state.[58] Almost one-quarter of the undocumented immigrants in the United States reside in California.[59] Twenty-seven percent of the state's population is foreign-born.[60] Although almost half of these residents are naturalized as United States citizens, the other half is undocumented or has a lawful status that could be easily lost by a criminal conviction.[61]

California has already established itself as an immigrant-friendly state. Over the past two decades, the state has passed a series of reforms designed to incorporate immigrants into the broader social fabric.[62] For example,

58. PUBLIC POLICY INSTITUTE OF CALIFORNIA, JUST THE FACTS: IMMIGRANTS IN CALIFORNIA (May 2013), http://www.ppic.org/main/publication_show.asp?i=258.

59. PUBLIC POLICY INSTITUTE OF CALIFORNIA, JUST THE FACTS: UNDOCUMENTED IMMIGRANTS (June 2015), http://www.ppic.org/main/publication_show.asp?i=818.

60. *Id.*

61. *Id.*

62. *See* Karthick Ramakrishnan & Allan Colbern, *The California Package of Immigrant Integration and the Evolving Nature of State Citizenship*, 6 POL'Y MATTERS 1 (2015) (referring to the more than a dozen laws passed in California since 2001 as producing "a kind of state-level citizenship" that they call "the California Package"). *See also* Huyen Pham & Pham Hoang Van, *Measuring the Climate for Immigrants: A State-by-State Analysis*, *in* STRANGE

immigrants in California now qualify for driver's licenses, in-state college tuition, and state professional licenses. California is also home to many nonprofit groups dedicated to advancing immigrant rights, which have worked tirelessly to educate the public and legislature about issues affecting the state's immigrant community.[63] Finally, Latino leadership in the California legislature has grown, including with the 2014 election of California State Senator Kevin de León as the first Latino President pro Tempore of the State Senate in more than a century.[64]

This Part analyzes three recent California reforms that (1) require prosecuting attorneys' offices to consider the collateral immigration consequences of plea bargains; (2) reduce the maximum sentencing exposure for state misdemeanors to 364 days; and (3) prohibit local jails from honoring certain immigration detainers. It is important to acknowledge these are not the only immigrant-focused criminal justice reforms adopted by the California legislature. Other pro-immigrant legal revisions that could just have easily been featured in this Essay include limiting the disclosure of juvenile records to immigration authorities and allowing immigrants to withdraw their guilty pleas after successfully completing a deferred entry of judgment drug rehabilitation program.[65]

NEIGHBORS: THE ROLE OF STATES IN IMMIGRATION POLICY 21 (Gabriel Jack Chin & Carissa Hessick, eds., 2014) (analyzing five years of data and finding that California and Illinois have the most positive climate for immigrants in the country).

63. An important empirical study by researchers at the University of California, Irvine, explores, among other topics, the role of nonprofits and organizing groups in immigrant incorporation. Sameer Ashar et al., *Navigating Liminal Legalities Along Pathways to Citizenship: Immigrant Vulnerability and the Role of Mediating Institutions* (Oct. 2015), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2733860.

64. *See* Biography, Senate President pro Tempore Kevin de León, http://sd24.senate.ca.gov/biography.

65. *See* A.B. 1352, 2015–2016 Reg. Sess. (Cal. Oct. 8, 2015) (codified at CAL. PENAL CODE § 1203.43 (West 2016)) (deferred entry of judgment); A.B. 899, 2015–2016 Reg. Sess. (Cal. Sep. 4, 2015) (codified at CAL. WELFARE & INSTITUTIONS CODE § 831 (West 2016)) (disclosure of juvenile records). For practice advisories on these new laws, see IMMIGRANT LEGAL RESOURCE CENTER, NEW CALIFORNIA LAW AB 8991 STRENGTHENS CONFIDENTIALITY PROTECTIONS FOR JUVENILE COURT-INVOLVED YOUTH (Jan. 2016), http://www.ilrc.org/files/documents/ab_899_fact_sheet_0.pdf; IMMIGRANT LEGAL RESOURCE CENTER, NEW CALIFORNIA DRUG PROVISION HELPS IMMIGRANTS (2015), https://www.ilrc.org/files/documents/new_california_drug_laws_1203.pdf.

A. Mandating that Prosecutors Consider Immigration Consequences in Plea Bargaining

On January 1, 2016, a California law went into effect that requires state prosecutors to take immigration status into account in reaching a just case outcome.[66] "In the interests of justice," Assembly Bill 1343 proclaims, prosecutors "shall consider the avoidance of adverse immigration consequences in the plea negotiation process as one factor in an effort to reach a just resolution."[67] Strikingly, this reform uses the mandatory language of "shall," thus demanding that prosecutors grapple with immigration status in the context of plea bargaining.

As a counterpart to the prosecutor requirement, the same legislation also includes a provision designed to ensure that defense counsel raise issues of collateral consequences with prosecutors. Specifically, defense counsel must "provide accurate and affirmative advice about the immigration consequences of a proposed disposition, and when consistent with the goals of and with the informed consent of the defendant, and with professional standards, defend against those consequences."[68] This complementary provision of the law will help to ensure that immigration issues are in fact raised with the prosecuting authority.[69]

The legislative history of Assembly Bill 1343 refers to the initiative as an effort to implement the United States Supreme Court's 2010 decision in *Padilla v. Kentucky*.[70] Writing for the majority in *Padilla*, Justice John Paul Stevens stressed that taking deportation into account in the plea bargaining process could encourage pleas that "better satisfy the interests of both

66. A.B. 1343, 2015–2016 Reg. Sess. (Cal. Oct. 9, 2015) (codified at CAL. PENAL CODE §§ 1016.2, 1016.3 (West 2016)).

67. *Id.*

68. *Id.* § 3.

69. For an insightful discussion of the potential of holistic defense models to improve immigrant representation within institutional public defender offices, see Andrés Dae Keun Kwon, *Defending Criminal(ized) "Aliens" After* Padilla*: Toward a More Holistic Public Immigration Defense in the Era of Crimmigration*, 63 UCLA L. REV. 1035 (2016).

70. A.B. 1343, *supra* note 66. The bill also refers to a series of earlier state court decisions holding that California defense counsel must advise their noncitizen clients about the specific immigration consequences of a conviction and also defend against those consequences. *See, e.g.*, People v. Soriano, 194 Cal.App.3d 1470 (Cal. Ct. App. 1987); People v. Barocio, 216 Cal.App.3d 99 (Cal. Ct. App. 1989); People v. Bautista, 115 Cal.App.4th 229 (Cal. Ct. App. 2004).

parties."[71] First, prosecutors can benefit because "the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does."[72] Second, defense counsel may be able to "craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence."[73]

California's call for prosecutors to bargain around immigration consequences marks an important effort to integrate the *Padilla* decision into everyday prosecutorial practice, and to make the standards for immigration plea bargaining more transparent.[74] Although California's law is still too fresh to analyze its implementation, it is nonetheless helpful to look at how some California prosecutor offices have addressed the immigration consequences of criminal convictions. In a related project, the author explores prosecutorial policies adopted in four of the largest California counties: Alameda, Los Angeles, Santa Clara, and Ventura.[75] All of these counties have independently adopted written policies that guide their prosecutors in how to think about deportation penalties in the context of charging and plea bargaining. For example, the policy adopted in Ventura County advises as follows:

> Collateral consequences are generally a normal and just consequence of a criminal conviction. However, in unusual cases, the collateral consequences may be so disproportionate to the severity of the crime and to the criminal punishment imposed as to be unjust. In such cases, the deputy district attorney's supervisor may approve deviation from our case disposition policy to avoid such consequences. The determination is highly case

71. Padilla v. Kentucky, 130 S. Ct. 1473, 1486 (2010) (finding that criminal defendants have a Sixth Amendment right to be advised of the potential immigration consequences of a guilty plea).

72. *Id.*

73. *Id.*

74. To be sure, *Padilla* has also influenced other local practices. As Stephanos Bibas has noted, some judges have given oral warnings to defendants in court and public defender offices have begun to more aggressively train attorneys on the immigration consequences of plea bargaining. Stephanos Bibas, *Incompetent Plea Bargaining and Extrajudicial Reforms*, 126 HARV. L. REV. 150, 165–66 (2012).

75. Ingrid V. Eagly, *Immigrant Protective Policies in Criminal Justice*, 95 TEX. L. REV. (forthcoming Dec. 2016).

> specific and shall be based upon careful consideration of all relevant relating to both the crime and the defendant.[76]

Such forward-thinking policies have the potential to reduce the number of crime-based deportations, particularly for lawful permanent residents charged with low-level crimes. As Heidi Altman has argued, written prosecutorial policies serve the important function of normalizing the practice of considering deportation penalties, including by crafting "alternative plea offers, when appropriate, to preserve noncitizen defendants' immigration status."[77] Assembly Bill 1343 promises to speed up what would have otherwise been a more gradual and ad hoc process of adopting office-wide prosecutorial policies on immigration consequences. The next section turns to a related state initiative to further lessen noncitizen exposure to deportation by reducing the maximum penalty for state misdemeanors.

B. Changing the State Definition of "Misdemeanor"

On January 1, 2015, a California law went into effect that is designed to reduce the deportation of immigrants convicted of misdemeanors. Specifically, Senate Bill 1310 amended the California Penal Code to shorten the maximum punishment for state misdemeanors by one day.[78] After this legislative change, California misdemeanors must not impose a punishment of greater than 364 days, rather than the previous cap of one year.[79] As the Senate Committee that passed the measure explained, the reform redefines

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76. Office of the District Attorney, County of Ventura, Legal Policies Manual 157 (revised Dec. 31, 2014) (obtained by author with public records request), *available at* http://libguides.law.ucla.edu/ld.php?content_id=13655316.

77. Heidi Altman, *Prosecuting Post*-Padilla*: State Interests and the Pursuit of Justice for Noncitizen Defendants*, 101 GEO. L.J. 1, 9 (2012). *See also* Jain, *supra* note 44, at 1216 (pointing out that prosecutors may "have incentives to mitigate when the collateral consequence is disproportionate—when it creates a harm that is not justified by any theory of punishment, such as deterrence or retribution").

78. S.B. 1310, 2013–2014 Reg. Sess. (Cal. July 21, 2014) (amending CAL. PENAL CODE § 18.5 (West 2016)). The amended Penal Code section now provides: "Every offense which is prescribed by any law of the state to be punishable by imprisonment in a county jail up to or not exceeding one year shall be punishable by imprisonment in a county jail for a period not to exceed 364 days." CAL. PENAL CODE § 18.5.

79. Some California misdemeanors have a maximum sentence of only six months. *See generally* IMMIGRANT LEGAL RESOURCE CENTER, CALIFORNIA DEFINES MISDEMEANOR AS MAXIMUM 364 DAYS (Jul. 2014), *available at* https://www.ilrc.org/california-defines-misdemeanor-maximum-364-days.

"misdemeanors" by providing "that for purposes of any offense for which the punishment [currently] is a year or up to a year in county jail the punishment shall be for not more than 364 days."[80]

The logic underlying Senate Bill 1310 is that many forms of deportation are currently triggered by conviction of a crime for which the possible sentence or sentence imposed is a year or greater.[81] For example, the immigration law makes a noncitizen deportable for a crime of moral turpitude committed within five years of admission so long as the potential sentencing exposure is at least one year.[82] In this scenario, it does not matter if the judge only imposed a sentence of probation or a week in jail. What matters is the maximum possible sentencing exposure under the law.

The length of the sentence is also important in determining whether a crime is an "aggravated felony," and thus a bar to most all forms of immigration relief. Counterintuitively, many state misdemeanors may be deemed "aggravated felonies" so long as a sentence of at least one year is imposed. For example, a misdemeanor crime of violence is an aggravated felony under the immigration law so long as the judge sentences the defendant to a term of imprisonment of at least a year.[83]

Prior to the passage of Senate Bill 1310, prosecutors and defense counsel could negotiate for a sentence of 364 or fewer days, and hope that the judge imposed it.[84] Today, in contrast, noncitizens in California do not have to rely on their counsel to negotiate the issue. Nor do they have to rely on a prosecutor or judge to find that 364 days or fewer is in fact the appropriate sentence. By taking a one-year sentence off the table for a large number of California crimes, this new law reduces the number of state convictions that qualify as aggravated felonies.

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80. The Senate Committee on Public Safety Bill Analysis of Senate Bill 1310 (2013–2014 Reg. Sess.), *available at* http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb_1301-1350/sb_1310_cfa_20140401_130813_sen_comm.html [hereinafter Senate Bill 1310 Analysis].

81. It is important to acknowledge that the federal definition of a crime that makes someone deportable is, like state law, subject change in the legislative process.

82. INA § 273(a)(2)(A)(i), 8 U.S.C. § 1227(a)(2)(A)(i) (West 2016).

83. INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F).

84. *See, e.g.*, Altman, *supra* note 77, at 23, n.173 (quoting Angie Junck of Immigrant Legal Resource Center, describing a case in which the defendant bargained for a felony plea to a sentence of 364 days in jail "in order to preserve his eligibility for relief in removal proceedings").

Given the prevalence of misdemeanors in the criminal justice system, Senate Bill 1310 is likely to affect many immigrants in the state.[85] In 2005, for example, almost a million California residents were arrested for misdemeanors.[86] For those convicted of these lower-level crimes, deportation is often the most severe aspect of a criminal conviction.[87]

It is also noteworthy that the California legislature explicitly penned this criminal law change with its deportation effect in mind. The legislative history of the bill makes clear that the "one year sentence deportation policy" is unfair because it results in deportations "due to minor crimes, such as writing a bad check."[88] The Senate Committee on Public Safety stressed in its analysis of the bill that deportations have deep societal and human costs:

> Those deported often leave behind families and children who depend on them for support. From 2010 through 2012 the U.S. Immigration and Customs Enforcement deported 204,000 immigrant parents from the U.S., which accounted for 23 percent of the total number of deportations during that time period. Many of those deported for minor offenses are longtime legal permanent residents of California, with deep connections to their families and communities.[89]

More recently, State Senator Ricardo Lara supported the passage of Senate Bill 1242, a new bill to make the 364 day misdemeanor law retroactive, by publicly proclaiming that "no family should be torn apart because of a minor legal technicality."[90] Similar concerns regarding the societal impact

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85. For a thoughtful exploration of the overlooked prevalence of misdemeanors in criminal courts today, see Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313 (2012).

86. According to California's Department of Justice, there were 939,046 misdemeanor arrests in 2005, compared to 538,166 felony arrests. *See* CAL. DEP'T OF JUSTICE, CRIME IN CALIFORNIA, 18, tbl. 17 (2010), https://oag.ca.gov/sites/all/files/agweb/pdfs/cjsc/publications/candd/cd10/preface.pdf.

87. Jason Cade and Jenny Roberts have both documented ways in which collateral consequences can dramatically outweigh the criminal penalty. Even worse, the incentives in misdemeanor courts and lack of effective trial counsel can pressure defendants to plead guilty without understanding the future impact of the plea. *See* Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751 (2013); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277 (2011).

88. Senate Bill 1310 Analysis, *supra* note 80, at 6.

89. *Id.*

90. Asia Morris, *Senator Lara Introduces Bill to Prevent Unnecessary Deportation of Legal Immigrants for Misdemeanors*, LONG BEACH POST, Mar. 31, 2016, https://lbpost.com/news/

of aggressive federal deportation policy underscore the initiative discussed in the next section: a state law that reduces cooperation between local jails and federal immigration enforcement.

C. Requiring Law Enforcement Agents to Refuse Certain Immigration Detainers

California's Transparency and Responsibility Using State Tool (TRUST) Act, which went into effect on January 1, 2014, limits local involvement in jail-based immigration screening and deportation.[91] There are three key attributes of the TRUST Act's design. First, the law makes clear that compliance with federal immigration authorities is discretionary, not mandatory.[92] Second, the law provides that holding an immigrant pursuant to an immigration detainer must comply with "any federal, state, or local law, or any local policy."[93] Third, the TRUST Act prevents any transfer of noncitizens into immigration detention until they are convicted of a serious or violent felony, a felony punishable by imprisonment in state prison, an aggravated felony under the federal immigration laws, or one of several enumerated crimes, such as assault, sexual abuse, child abuse, or burglary.[94]

Importantly, individuals who are charged but not yet convicted do not satisfy the TRUST Act. Therefore, immigrants released from criminal custody pending trial should be eligible for release on bond in the same way as citizens.[95] The TRUST Act also prohibits the transfer of individuals

2000008505-senator-lara-introduces-bill-to-prevent-unnecessary-deportation-of-legal-immigrants-for-low-level-misdemeanors (reporting on the introduction of Senate Bill 1242). *See* S.B. 1242, 2015–2016 Reg. Sess. (Cal. Sept. 28, 2016) (amending CAL. PENAL CODE § 18.5 (West 2016)).

91. TRUST Act, A.B. 4, 2013–2014 Reg. Sess. (Cal. Oct. 5, 2013) (codified at CAL. GOV'T CODE §§ 7282–7282.5 (2015)). For a timely scholarly analysis of the TRUST Act, see Carrie Lynn Rosenbaum, *The Role of Equality Principles in Preemption Analysis of Sub-Federal Immigration Laws: The California Trust Act*, 18 CHAPMAN L. REV. 481 (2015).

92. CAL. GOV'T CODE § 7282.5(a) (West 2016) (stressing that "[a] law enforcement official shall have discretion to cooperate with federal immigration officials . . . ").

93. *Id.*

94. *Id.* In two circumstances the TRUST Act allows for noncitizens to be transferred to immigration custody without a conviction: (1) if a magistrate makes a finding of probable cause on certain types of felony charges; and (2) if the noncitizen is a current registrant on the California Sex and Arson Registry. *Id.* § 7282.5(a)(4), (5).

95. After the passage of the TRUST Act, civil rights groups have challenged localities that persist in violating an immigrant's right to pretrial release based on an "immigration hold."

convicted of misdemeanors that are not serious or violent, such as driving without a license or public disturbance.

Shortly after passage of the TRUST Act, California's Attorney General Kamala Harris issued guidance to law enforcement outlining the circumstances in which compliance with immigration detainers would violate state law.[96] Attorney General Harris explained that one of the benefits of the state law is that it protects localities against possibly being found "liable for damages" for compliance with an ICE request where there is no legal ground for continued detention.[97] For example, a federal district judge in Oregon found that a local jail violated the Fourth Amendment by holding someone on such a request without probable cause or a judicially issued warrant.[98] This same concern is reflected in the preamble to the TRUST Act, which warns: "[T]here is no requirement for a warrant and no established standard of proof or probable cause for issuing an ICE detainer request. Immigration detainers have erroneously been placed on United States citizens as well as immigrants who are not deportable."[99]

In related research, the author examines jail policies in several California counties and finds that they not only comply with the California TRUST Act, but they also go further.[100] For example, the policy of the Ventura County Sheriff clarifies that the department does not "book any ICE Detainers."[101] Instead, the Sheriff explains that when his office receives ICE

For example, in *Flores v. City of Baldwin Park*, a coalition of immigrant rights groups sued the Baldwin Park Police Department and the City of Baldwin Park for detaining an immigrant based solely on an immigration hold in violation of California's TRUST Act. *See* Complaint, No. CV 14–9290–MWF, Flores v. City of Baldwin Park (filed Oct. 8, 2014), *available at* https://maldef.org/assets/pdf/Complaint_FloresvBaldwin_Park-Filed-Endorsed_10-6-14.pdf.

96. California Department of Justice, California Justice Information Services Division, Information Bulletin No. 14-01 (2014), *available at* http://oag.ca.gov/sites/all/files/agweb/pdfs/law_enforcement/14-01_le_info_bulletin.pdf.

97. *Id.*

98. Miranda-Olivares v. Clackamas Cnty., No. 3:12-cv-02317-ST, 2014 WL 1414305 (D. Or. Apr. 11, 2014). Work by Christopher Lasch has been influential in developing litigation strategy to challenge detainer authority. *See, e.g.*, Christopher N. Lasch, *Litigating Immigration Detainer Issues*, *in* 2 Immigration Law for the Colorado Practitioner 34-1 (Nancy B. Elkind et al. eds., 2013).

99. TRUST Act, *supra* note 91, at § 1.

100. Eagly, *supra* note 75.

101. Memorandum from Laura Flowers, Central Inmate Records Manager for the Ventura County Sheriff's Department, to Tracy Martinez-Aguilar, Legal Unit (Oct. 30,

Detainers, "we simply file them in the inmate's file for archival purposes."[102] According to one report based on ICE data compiled after the TRUST Act went into effect, California leads the nation in the number of immigration detainers denied by local jails.[103]

The TRUST Act is one of two state laws in the nation to limit compliance with immigration detainers. In 2013, Connecticut also passed a TRUST Act bill to limit enforcement under the federal Secure Communities program.[104] More recently, similar legislation has been adopted by numerous localities and proposed in other states, including Illinois, Rhode Island, Massachusetts, and Maryland. These state and local laws are part of growing opposition to the federal enlisting of local police and jails in enforcing immigration.[105]

Under PEP (the replacement program to Secure Communities mentioned in Part I), the federal government promises to make changes that may address some of the criticisms of the TRUST Act. Immigration scholar Cristina Rodríguez has described the PEP initiative as "an enormous first step" to respond to "local pressures" to achieve a "fair and legitimate system of enforcement."[106] However, immigrant rights groups have charged that PEP is little more than Secure Communities under

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2015) (obtained by author with public records request), *available at* http://libguides.law.ucla.edu/ld.php?content_id=13663276.

102. *Id.*

103. Morgan Smith & Jay Root, *Jails Refused to Hold Thousands of Immigrants for Feds*, THE TEX. TRIB., Jan. 15, 2016, https://www.texastribune.org/2016/01/15/34-texas-counties-declined-hold-deportable-immigra/ (reporting based on Immigration and Customs Enforcement data that 11,171 of the 18,646 detainers declined in the United States between January 2014 and September 2015 were in the state of California).

104. Connecticut TRUST Act, P.A. No. 13-155, 2013–14 Gen. Assemb. (Conn. June 25, 2013) (codified at CONN. GEN. STAT. § 54-192h (West 2016)).

105. The Immigrant Legal Resource Center has prepared an interactive map that traces state and local efforts to combat immigration enforcement. *See* Immigration Legal Resource Center, Immigration Enforcement, http://www.ilrc.org/enforcement. For an empirical analysis of state and local justifications for not cooperating with federal immigration detainers, see Ming H. Chen, *Trust in Immigration Enforcement: State Noncooperation and Sanctuary Cities After Secure Communities*, 91 CHI.-KENT L. REV. 13 (2016).

106. Cristina M. Rodríguez, *Toward Détente in Immigration Federalism*, 30 J.L. & POL. 505 (2015). *See also* David A. Martin, *Resolute Enforcement is Not Just for Restrictionists: Building a Stable and Efficient Immigration Enforcement System*, 30 J.L. & POL. 446, 457 (2015) (describing the PEP program as a positive step in "building a healthy interior enforcement system").

a different name.[107] Concerns remain that PEP leaves in place wide discretion for deportation by continuing to link immigration enforcement to criminal arrest. Above all, PEP maintains an enforcement atmosphere in which immigrants live in fear because of the uncertainty of their status.[108]

Local enforcement of immigration law remains a dynamic area of constant change. It is too early to predict how PEP will be implemented in practice. In the meantime, a new law just passed by the California legislature, the Transparent Review of Unjust Transfers and Holds (TRUTH) Act, provides that local officials must obtain written consent from individuals before allowing ICE to interview them for civil enforcement purposes in the jail.[109] The legislation also requires the engagement of local communities and city leaders before local jails agree to participate in jail-based deportation programs. Like the TRUST Act, the TRUTH Act guards against a patchwork approach whereby each county implements fundamentally different policies on whether and how to cooperate with federal enforcement efforts.[110]

CONCLUSION

After a long period of hypercriminalization, the United States criminal justice system is experiencing a moment of steady decriminalization. Largely forgotten in this era of criminal justice reform, however, is the

107. *See, e.g.*, Jennie Pasquarella, *ICE Plays Name Game*, LA PROGRESSIVE (June 27, 2015), *available at* https://www.laprogressive.com/ice-priority-enforcement-program/; AMERICAN CIVIL LIBERTIES UNION, DHS SECRETARY JOHNSON DISCONTINUES SECURE COMMUNITIES "AS WE KNOW IT" (Dec. 17, 2014), https://www.aclu.org/files/assets/2014_12_18_-_aclu_summary_of_dhs_scomm_and_detainer_reforms_final.pdf.

108. Cesar Lara & Angie Junck, *Sheriff's Collaboration with ICE Betrays Community Trust*, MONTEREY COUNTY HERALD, Nov. 21, 2015, http://www.montereyherald.com/article/NF/20151121/NEWS/151129936 (noting that after one California county implemented PEP, "immigrants and their families are now and increasingly hesitant to come forward to report crimes and be witnesses to crime because they fear that they will be deported").

109. TRUTH Act, A.B. 2792, 2015–2016 Reg. Sess. (Cal. Sept. 28, 2016) (codified at CAL. GOV'T CODE § 7283 (West 2016)).

110. *See generally* Monica Varsanyi et al., *A Multilayered Jurisdictional Patchwork: Immigration Federalism in the United States*, 34 L. & POL'Y 138, 140–43 (2012) (documenting variation in local approaches to cooperating with federal immigration enforcement).

treatment of immigrants charged with crimes. An unprecedented ratchet in the opposite direction has directed intense immigration enforcement efforts on "felons, not families," carving out a separate system of punitive treatment reserved for immigrants.

Until recently, immigrant rights advocates have not focused their critical lens on how the *criminal justice system* could address some of these problems. Instead, most thinking about how to ease the punitive aspects of criminal-immigration entanglement have centered on possible changes within the *immigration enforcement system*. Proposals that have garnered attention include less reliance on immigration detention,[111] fewer statutory grounds for removal,[112] graduated immigration sanctions short of deportation,[113] and more forms of relief from deportation.[114] Comparatively less attention has been given to how reform of the criminal justice system could contribute to disentangling criminal adjudication from immigration enforcement.[115] Instead, as Rebecca Sharpless has astutely observed, "[m]ainstream pro-immigrant law reformers" have traditionally advocated for more humane treatment of "deserving immigrants" by contrasting them

111. *See, e.g.*, García Hernández, *supra* note 28, at 1511 (arguing that immigration imprisonment should be permitted only in narrow circumstances where necessary to protect public safety or guard against risk of flight); Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 47 (2010) (assessing the feasibility of a truly "civil" immigration detention system).

112. *See, e.g.*, Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105 (2012) (showing how reducing reliance on crime-based removal is an important part of undoing the "criminal-immigration convergence").

113. *See, e.g.*, Daniel Kanstroom, *Smart(er) Enforcement: Rethinking Removal*, 30 J.L. & POL. 465, 466 (2015) (advocating structural reforms to the immigration law to "take the notions of proportionality and graduated sanctions seriously").

114. *See, e.g.*, Jason A. Cade, *Enforcing Immigration Equity*, 84 FORDHAM L. REV. 661, 716–17 (2015) (calling for Congress to "reallocate broad power to immigration judges to balance the equitable fairness of deportation in individual cases").

115. For two important exceptions, see Jennifer M. Chacón, *Tensions and Trade-Offs: Protecting Trafficking Victims in the Era of Immigration Enforcement*, 158 U. PENN. L. REV. 1609 (2010) (showing the ways in which criminal trafficking laws and prosecutions may reinforce the vulnerability of migrants and turning to state anti-trafficking laws for potential models); Mary Fan, *The Case for Crimmigration Reform*, 92 N.C. L. REV. 75 (2013) (arguing that crimmigration reform should include reduced reliance on federal prosecution of immigration crime).

to "people convicted of a crime."[116] This deficit is particularly notable in the current moment of increasing enforcement against immigrants facing criminal charges, a trend that is expected to accelerate under the presidency of Donald Trump.

For a possible way out of this predicament, this Essay has presented a case study of three recent reforms in California designed to make noncitizens entangled in the criminal justice system less vulnerable to deportation. Each of these reforms operates by unhinging the state's criminal adjudication process from the immigration system's mechanisms of deportation. In California, misdemeanors are now less likely to result in deportation, and prosecutors are encouraged to avoid the disproportionate collateral consequence of deportation when fashioning a plea. Even if a conviction does result, jails will not honor immigration detainer requests unless the conviction is sufficiently serious. Such state reforms also have an important messaging function: they communicate to federal authorities that the deportation regime has gone too far and thus potentially encourage future changes in federal enforcement practices.[117]

Additional legislative changes not featured in this Essay also form part of the California slate of immigrant-focused criminal justice reform. For example, California law now protects juvenile delinquency adjudications from being shared with immigration authorities.[118] Other innovative proposals—including the TRUTH Act (to limit immigration enforcement in local jails) and Senate Bill 1242 (to retroactively reclassify old state misdemeanor convictions as having a maximum sentence of 364 days)—have also recently become law.[119] Together, these initiatives constitute a bold step toward remedying some of the deportation concerns of noncitizen criminal defendants. Moreover, suggesting that these pro-immigrant reforms may spread beyond California, a brand new national campaign spearheaded by the Immigrant Justice Network has prioritized ending the mass criminalization of immigrants by not only by fixing the

116. Rebecca Sharpless, *"Immigrants Are Not Criminals": Respectability, Immigration Reform, and Hyperincarceration*, 53 HOUS. L. REV. 691, 693, 765 (2016).

117. As David Sklansky has noted, state decisions regarding crimmigration can force "federal officials to soften some policies regarding noncitizens suspected or convicted of crimes," including by encouraging changes in federal deportation priorities. Sklansky, *supra* note 25, at 220–21.

118. *See* A.B. 899, *supra* note 65.

119. *See supra* notes 90, 109.

immigration laws, but also by exposing citizenship and racial inequality in the criminal justice system.[120]

To be sure, understanding how local criminal justice systems treat noncitizens requires further study. A small but growing body of scholarship highlights troubling issues that go beyond the linkage between conviction and deportation. Indeed, this important emerging research suggests that the confluence of migration and criminal control is also giving way to more punitive treatment of foreigners and racial minorities within the criminal adjudication process itself. For instance, Michael Light's analysis of federal sentencing patterns uncovers an immigrant "sentencing penalty," meaning that convicted noncitizens are more likely than their citizen counterparts to receive prison sentences for the same crimes.[121] Examining the use of interpreters in criminal courts, Ana Aliverti and Rachel Seoighe reveal how foreign national criminal defendants are treated "as unwelcome and a burden on the system."[122] Mary Bosworth's contribution to this Issue uncovers the practice of sending foreign nationals to their home country to serve out their sentences in segregated and inferior prisons.[123] Future criminal justice reforms should address these and other practices that foster a second-tier system for immigrants charged with crimes.

120. *See* Immigrant Justice Network, Fix '96, A Vision for Ending the Criminalization of Immigrants (Apr. 28, 2016), http://immigrantjusticenetwork.org/resources/fix96/ (announcing a campaign to #FIX96 that will, among other goals, "ensure immigrants have equal access to justice in the criminal system").

121. Light, *supra* note 7, at 468.

122. Ana Aliverti & Rachel Seoighe, *Lost in Translation? Examining the Role of Court Interpreters in Cases Involving Foreign National Defendants in England and Wales*, 19 NEW CRIM. L. REV. 129 (2017).

123. Mary Bosworth, *Penal Humanitarism: Sovereign Power in an Era of Mass Migration*, 19 NEW CRIM. L. REV. 39 (2017).