

WHY COMMUNITY PROSECUTORS SHOULD CARE ABOUT THE IMMIGRATION CONSEQUENCES OF CONVICTIONS

By:

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The United States Supreme Court has held that criminal defense counsel is constitutionally obligated to advise noncitizen defendants about the immigration penalties of guilty pleas and to defend against such consequences. But what is the role of the prosecutor when a noncitizen defendant faces the possibility of deportation? For community prosecutors, this question is timely and vital. Entire communities – and, frequently, victims – are impacted when a noncitizen defendant is deported. Current immigration enforcement efforts are unprecedented in scale and scope, and those caught up in the system often face penalties grossly disproportionate to the underlying criminal offense.

This article seeks to: present the various types of immigration penalties that flow from criminal charges; explore the ways in which these penalties raise community safety concerns; and discuss ideas for moving forward.

What are the immigration penalties of criminal convictions?

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

For example, automatic deportation is a mandatory minimum sentence for noncitizens convicted of an offense defined as an “aggravated felony” under immigration law. In many cases the definition is unrelated to any criminal definition and includes non-violent offenses and misdemeanors. Examples of such offenses include: a shoplifting offense with a one year suspended sentence; misdemeanor possession of marijuana with the intent to sell; or sale of counterfeit DVDs with a one year suspended sentence. Due to the mandatory nature of these punishments, noncitizens convicted of an aggravated felony are given a life sentence of exile (deported) without the opportunity for a judge to consider the individual circumstances of their case, such as whether the person is a longtime green card holder, has U.S. citizen family members, is a veteran of the U.S. military, is a refugee or asylee, owns a business, or has rehabilitated.

Lundy Khoy is an example of the mandatory and often grossly disproportionate immigration consequences imposed on noncitizens convicted of an aggravated felony. Lundy was born in a refugee camp in Thailand after her family fled the Cambodian genocide, and came to the United States when she was one year old. More than ten years ago, as a freshman in college, Lundy was caught with ecstasy on her way to a party and was convicted of possession with intent to distribute. She served three months of her sentence and was released by a judge for good behavior. Lundy completed four years of supervised

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probation without missing an appointment or failing a drug test. Now a grown woman who has continued her education and is a dedicated volunteer in her community, she has been ordered deported by an immigration judge on the basis of this conviction, without consideration of the individual circumstances of her case. Her family members, including her parents and two siblings, are all here in the United States living either as citizens or lawful permanent residents.

Any noncitizen of the United States – including longtime green card holders like Lundy and undocumented immigrants – may be subject to deportation because of a criminal conviction. This is true even for long-ago convictions for which the noncitizen was already punished under the criminal justice system and which may no longer exist on his or her state criminal record.

Why should community prosecutors be concerned with these immigration penalties?

Deportation following a criminal conviction has significant and often devastating impacts on the emotional and financial well-being of innocent community members, including victims of crime. This creates vulnerabilities in the very communities prosecutors seek to protect. These impacts include the following:

- A defendant's deportation may result in the separation of a family, often including U.S.-born children. According to a recent report, 23% of all persons deported in the last two years were a parent of at least one U.S. citizen child. These children are left behind to be raised by a single parent, relatives, or the foster care system. In fact, at least 5,000 children are presently in foster care nationwide subsequent to the deportation or detention of a parent by Immigration and Customs Enforcement (ICE). Studies show that children left behind by deportation are more likely to engage in behavior that is both self-destructive and destructive to the larger community. In a study of children whose parents had been the subject of an immigration enforcement action, for example, nearly half began displaying "angry or aggressive" behavior that was persistent over the long term. Children raised in non-intact family homes, such as single parent homes or the foster care system, demonstrate significantly increased risks of incarceration

and illegal behavior. One defendant's deportation may, therefore, leave that defendant's child more vulnerable to future arrest and incarceration.

- In some cases, the defendant's deportation may have a negative impact on the victim of the underlying offense. In domestic violence cases, for example, the deportation of a defendant may leave the victim as a single parent without marital and/or child support. Similarly, in cases where restitution is a part of the sentence imposed, the defendant's deportation is likely to render him unable to pay and out of reach of the United States criminal justice system.

- Noncitizen defendants are often bread-winners whose deportation leaves their families facing economic crises, resulting in increased reliance on public benefits. In a recent study of families affected by immigration enforcement actions, common financial repercussions of deportation included food instability, loss of housing, and greater reliance on government assistance programs such as food stamps.

What role can prosecutors play?

The Supreme Court of the United States has encouraged both the defense and the prosecution to bring immigration penalties into the plea bargaining process in order to "reach agreements that better satisfy the interests of both parties." Defense counsel and prosecution can then work together "to plea bargain creatively ... in order to craft a conviction and sentence that reduce the likelihood of deportation." Various options exist for the type of "creative plea bargaining" that the Padilla decision endorses, including:

- Alternative plea agreement: The defense and prosecution may agree to an alternative plea that is of a similar nature and severity to the originally charged offense, but minimizes the defendant's exposure to disproportionate immigration penalties.

- Alternative sentencing agreement: The defense and prosecution may agree to alter the sentencing component of the plea. For example, a sentence of 364 days rather than 365 days on certain offenses may avoid triggering mandatory deportation grounds, preserving for some defendants the opportunity to present the individual circumstances of their case to an immigration judge.

- **Modified record of conviction:** The prosecutor may modify the language included in documents in the court file that pertain to the criminal charges, conviction, or sentencing, so as to mitigate the potential immigration consequences of the conviction. The language included in these documents is often relevant to subsequent determinations of whether the noncitizen will face mandatory deportation. In cases involving fraud-related charges, for example, a plea to an offense that caused a loss to the victim of less than \$10,000 may provide some noncitizen defendants with a defense against an aggravated felony charge in immigration court, even if the defendant is directed to pay more than \$10,000 restitution.

- **Access to pre-plea treatment programs:** The defense and prosecution may work together to ensure that noncitizen defendants can participate in court-sponsored treatment programs, often referred to as deferred prosecution or diversion programs, without first entering a plea of guilty. Many treatment programs require the entry of a guilty plea prior to participation, triggering irreversible deportation consequences even if that plea is later withdrawn. Furthermore, many noncitizen defendants are precluded from participation in treatment programs entirely because of the presence of an immigration detainer. The defense and prosecution may work together to ensure access in such cases by advocating for ICE to lift the detainer.

Dr. Luis Zayas, Dean of the School of Social Work at the University of Texas, is one member of a team of researchers exploring the psychological effects of deportation on children left behind. Describing the depth of these effects, Dr. Zayas has stated that, “No parent should be put through such an anguishing decision of whether or not to leave a child behind, but most importantly, how will these kids feel about their government when they grow up?” Community prosecutors must take these concerns to heart when prosecuting noncitizens. Local lead prosecutors should ensure that their prosecuting attorneys have access to reliable sources of information and training regarding immigration penalties of convictions. And, most importantly, it is time for community prosecutors to establish a culture of awareness and compassion when considering the often disproportionate, mandatory, and harsh immigration consequences of convictions.

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Her expertise is on the immigration consequences of crime and delinquency. She regularly provides immigration trainings and technical assistance to indigent defenders, prosecutors, criminal and juvenile court judges, and law enforcement officials. She is a co-author of numerous publications including ILRC’s Defending Immigrants in the Ninth Circuit: The Impact of Crimes under California and Other State Laws and Immigration Benchbook for Juvenile and Family Courts. She sits on the American Bar Association’s Immigration Commission and is the co-chair of the Immigration Committee of the ABA’s Criminal Justice Section.

Heidi Altman serves as Legal Director at the Capital Area Immigrants’ Rights (CAIR) Coalition, providing services to immigrants in detention in the D.C. metropolitan area. Heidi previously served as a Clinical Teaching Fellow at Georgetown Law School’s immigration and asylum clinic and created and led an in-house immigration services program at the Neighborhood Defender Service of Harlem, a public defender office in New York City. Heidi is a graduate of New York University Law School.