



IMMIGRATION-RELATED PROSECUTORIAL CONSIDERATIONS DO NOT VIOLATE THE EQUAL PROTECTION RIGHTS OF CITIZENS

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I. Introduction

Increasingly prosecutors are asked to consider immigration consequences in the charging and plea-bargaining process. Some states have adopted policies requiring prosecutors to consider such consequences, see, e.g., Cal. Pen. C. § 1016.3(b), and some prosecutor offices have adopted internal guidelines mandating the consideration of immigration consequences. This advisory provides context for why such a prosecutorial policy or practice is legally necessary and permitted, if not mandated, by constitutional law and governing codes of conduct.

II. Because Immigration Consequences Represent an Integral Part of Criminal Punishments, They Must be Considered as Part of the Charging and Plea-Bargaining Process.

In the landmark decision *Padilla v. Kentucky*, the U.S. Supreme Court explained that “as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.” 559 U.S. 356, 362 (2010). The immigration consequences that flow from a criminal conviction are so “intimately related” to the criminal process that they are the only type of non-penal consequences the Court has found to implicate the Sixth Amendment rights of defendants. *Id.* at 357. Adverse immigration consequences are “uniquely difficult to classify as either a direct or a collateral consequence,” because, though removal proceedings are considered civil, deportation is the functional “equivalent of banishment or exile.” *Id.* at 366, 373-74.

In practical terms, this means that a citizen and a noncitizen—each with the exact same culpability—could be convicted of the same crime and receive the same sentence, but the citizen would walk out of jail and return to their family, while the noncitizen could serve the same sentence and then face release, not to their family, but to an ICE officer who transfers the noncitizen immediately to an immigration detention facility to face possible deportation. For the noncitizen defendant, the consequences of a criminal conviction may include mandatory deportation, compulsory indefinite detention in an immigration facility, loss of a green card, inability to travel internationally, and preclusion from obtaining future immigration status such as a green card or U.S. citizenship. Unfortunately, this punishment will not only affect the defendant, it will also have a lasting impact

on their family and community¹, including increasing dependency on Medicaid, causing evictions of families, and sending children into the foster care system.²

Under certain circumstances, prosecutors may decide that these additional consequences are merited based on the characteristics of the case or the defendant, but often these consequences may be deemed excessive in light of the underlying offense. Regardless of the ultimate action made by the prosecutor, however, because the Supreme Court has held that immigration consequences are “intrinsically intertwined” with the penal consequences, and are not “collateral,” a prosecutor must be aware of them, just as they are aware of the maximum sentence exposure a charged offense may have.

III. Prosecutorial Consideration of Immigration-Related Consequences Does Not Violate the Equal Protection Rights of Citizen Defendants.

When prosecutors take into account immigration consequences, they do not violate the Equal Protection rights of citizen defendants. The Equal Protection component of the Due Process Clause prohibits prosecutors from basing their decisions on “an unjustifiable standard such as race, religion, or other arbitrary classification,” but it does not prohibit prosecutors from exercising their “broad discretion” to enforce the law. *United States v. Armstrong*, 517 U.S. 456, 464-466 (1996); *Oyler v. Boles*, 368 U.S. 448, 456 (1962). Only when prosecutors have administered a criminal law “so exclusively against a particular class of persons[,]... with a mind so unequal and oppressive,” does a system of prosecution amount to a practical denial of Equal Protection under the law. *Armstrong*, 517 U.S. at 464-65 (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886)).

The standard is a steep one. A general presumption of constitutionality supports prosecutorial decisions. In the absence of clear evidence to the contrary, courts presume that prosecutors have properly discharged their official duties. *Armstrong*, 517 U.S. at 464. The judiciary generally defers to the decisions of prosecutors because of the complex reasons that go into such decisions, including the strength of the case, the general deterrence value of a given punishment, existing prosecutorial priorities, and the case’s relationship to the prosecutor’s overall enforcement plan. *Id.* at 465.

To overcome the presumption *against* claims of prosecutorial Equal Protection violations, a defendant must demonstrate that a prosecutorial policy or practice had a discriminatory effect, was motivated by a discriminatory purpose, and was not sufficiently tailored to meet a compelling government purpose. See *Armstrong*, 517 U.S. at 464; *Craig v. Boren* 429 U.S. 190, 200 (1973).

A. Prosecutorial Consideration of the Immigration-Related Consequences of a Criminal Conviction Does Not Have a Discriminatory Effect Because a Citizen is Not Similarly Situated to a Noncitizen.

To establish a discriminatory effect in a race case, an individual claimant must show that similarly situated individuals of a different race are not prosecuted for that same conduct. *Armstrong*, 517 U.S. 456, 465 (1996). Therefore, for a citizen defendant to support a claim that prosecutorial consideration of immigration-related consequences violates a citizen’s Equal Protection rights, they would have to show that others who are similarly situated to the citizen defendant are not generally prosecuted for similar conduct, and that the citizen defendant has been intentionally singled out for prosecution solely because he is a citizen. *Ibid.*

The Constitution does not require things which are different in fact or opinion to be treated as though they were the same. *Tigner v. Texas*, 310 U.S. 141, 147 (1940). A citizen defendant and a noncitizen are differently situated. A noncitizen defendant will experience adverse immigration consequences after a conviction, including deportation, as a result of a criminal conviction, and a citizen defendant will not. *Jankowski-Burczyk v. Immigration and Naturalization Serv.*, 291 F.3d 172, 175 (2d Cir. 2002) (holding that even lawful permanent residents and non-lawful permanent residents are not “similarly situated” due to the difference between their immigration statuses).

These policies do not violate Equal Protection because they do not have a discriminatory effect. Not only are citizens and noncitizens not similarly situated, but consideration of immigration-related consequences also does not require prosecutors to offer a lesser disposition, let alone decline to prosecute, noncitizen defendants. Many times, prosecutors are concerned that consideration of immigration consequences must lead to a less serious conviction or lesser sentence for noncitizens, but that concern is unfounded. Culpable noncitizen defendants will still face criminal liability.

In most cases, the defense can identify an immigration-safe alternative disposition that is commensurate with the original offer or recommendation and carries commensurate penalties.³ In some cases, an immigration-neutral offense and penalty can be even more severe than the original offer while still mitigating adverse immigration consequences.⁴ Of course, in some instances, the prosecuting attorney may determine that a criminal conviction and/or sentence will result in immigration consequences that are disproportionate to the crime the defendant is accused of committing, and in such cases the prosecutor may choose to offer a lesser disposition, perhaps in exchange for additional or extended probation terms. *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978). But that outcome is by no means prescribed under a policy requiring prosecutors to consider immigration consequences. Instead, there are many ways in which prosecutors may constitutionally exercise their discretion and consider the immigration consequences of criminal dispositions.

Citizen defendants may not directly derive some benefit from a policy requiring district attorneys to consider immigration-related consequences, but they also do not suffer as a result of such considerations.⁵ Some prosecutor offices have even required that any alternative disposition offered to noncitizen defendants must also be made available to citizen defendants.⁶ A policy mandating immigration-related considerations simply formalizes and affirms the fact that immigration consequences are one of several factors that prosecutors should take into account when making charging and sentencing decisions.⁷ Because citizen and noncitizen defendants are not similarly situated, and immigration policies have no discriminatory effect, the Equal Protection rights of citizen defendants are not implicated.

B. Prosecutorial Consideration of the Immigration-Related Consequences of a Criminal Conviction is Not Motivated by an Intent to Discriminate Against Citizen Defendants.

A policy requiring prosecutorial consideration of adverse immigration consequences has no discriminatory effect on citizen defendants, but if it did, this effect would not be purposefully or intentionally discriminatory. *Armstrong*, 517 U.S. 456, 65 (1996). To support a claim of discriminatory intent, it must be proven that the selective enforcement at issue was deliberately motivated by an unjustifiable standard such as race, religion, or other arbitrary classification. *Id.*

Instead, the U.S. Supreme Court has mandated the consideration of immigration considerations in criminal proceedings specifically *because* noncitizen defendants can face uniquely serious immigration consequences. *Padilla v. Kentucky*, 559 U.S. 356, 373-74 (2010). The Court found that, under the Sixth Amendment, defense attorneys have a special duty to warn noncitizen defendants about immigration consequences, and explained that consideration of these consequences “benefit[s] both the State and noncitizen defendants.” *Id.* at 373. Consideration of the immigration effects of a criminal disposition therefore is both not intentionally discriminatory and actually serves to protect the constitutional rights of defendants that face uniquely serious consequences.

C. A Policy Requiring Prosecutorial Consideration of the Immigration-Related Consequences is Narrowly Tailored to Achieve a Compelling Government Interest.

Even if a prosecutorial policy requiring immigration-related considerations was found to have an intentionally discriminatory effect against United States citizens generally, the policy would survive even the strict scrutiny analysis⁸ because it would be considered “narrowly tailored to achieve a compelling government interest.” *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). By requiring consideration of immigration-related consequences, such a prosecutorial policy serves numerous vital government interests: complying with federal, and in some cases, state, law; ensuring efficient case resolutions; protecting communities from the destabilizing impact of deportations; and promoting trust between the immigrant community and law enforcement.

The government has an interest in achieving just resolutions in all criminal cases, including those involving noncitizen defendants.⁹ A policy requiring prosecutors to consider immigration consequences is key to achieving this compelling interest, because deportation, detention, and other related consequences can be even more destructive than a criminal conviction or jailtime itself. *Padilla v. Kentucky*, 559 U.S. 356, 368 (2010); *See also Lee v. U.S.*, 137 U.S. 1958, 1966-67 (describing the risk of deportation triggered by a conviction as so dire that the noncitizen defendant would take a chance and throw a “Hail Mary” at his criminal trial in an attempt avoid deportation). The Court has recognized that informed consideration of possible deportation can benefit government prosecutors, as well as noncitizen defendants, both because prosecutors have a duty to ensure that defendants are punished in a way that vindicates the law and because cases are more likely to be resolved efficiently when a defendant is assured that a plea will not affect their immigration status or ability to remain in the United States.¹⁰

Such a policy would also be narrowly tailored because the only way to ensure appropriate criminal dispositions for noncitizen defendants is for prosecutors to consider how particular outcomes could affect a defendant’s immigration status or ability to eventually rejoin their community. *See Craig v. Boren*, 429 U.S. 190, 200 (1973). Even then, such a policy would only require prosecutors to *consider* immigration consequences, but would not require prosecutors to take particular actions based on these considerations.¹¹ A policy requiring prosecutors to take immigration consequences into account thus achieves precisely what it is designed to do—encourage prosecutors to pursue appropriate criminal dispositions based on the unique features of each case. In this way, it is neither overinclusive nor underinclusive, but closely serves to achieve an important government objective. *See Craig v. Boren*, 429 U.S. at 226-227.

Prosecutor offices certainly have a “compelling interest” in resolving cases efficiently, protecting their communities, and complying with higher laws, and since a government policy requiring prosecutorial consideration of immigration consequences satisfies these important government objectives, such a policy must be considered “narrowly tailored” for purposes of an Equal Protection analysis. See *Craig v. Boren*, 429 U.S. at 226-227; *Grutter v. Bollinger*, 539 U.S. at 326.

IV. Prosecutorial Discretion Encourages Consideration of All Serious Consequences, Including Immigration-Related Consequences, That Follow From Criminal Convictions.

The primary duty of a prosecutor is to seek justice and protect public safety.¹² As the administrator of justice, the prosecutor must not merely convict, but must act with integrity and balanced judgment to increase public safety.¹³ Prosecutors have a “greater responsibility,” beyond proving guilt or innocence and obtaining convictions, to “know what happens after a prisoner is taken away” in order to “be sure he must be punished [in that way] to vindicate the law.”¹⁴ Prosecutors must comprehend the full range of consequences that flow from a conviction and consider them if they are to see that justice is done.¹⁵ If prosecutors fail to consider such consequences, they are likely to suffer disrespect and loss of confidence from the very public they are mandated to protect.¹⁶ But through the thoughtful exercise of their discretion, prosecutors can help prevent outcomes in which the consequences of a conviction far exceed the criminal punishment for the crime itself.¹⁷ As the immigration penalties that attach to convictions become more severe, considering those attendant penalties becomes a central part of the prosecutor’s duty.

As a matter of law, prosecutors are afforded significant discretion in charging and plea bargaining decisions.¹⁸ The Supreme Court of the United States has held that, “so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests *entirely* in his discretion.” *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978). The Court has also recognized the complex reasons that go into prosecutorial decision-making—including the strength of the case, general deterrence value, the prosecutorial priorities, and the case’s relationship to the overall prosecutorial plan—which is why courts are “properly hesitant to examine the decision whether to prosecute.” *United States v. Armstrong*, 517 U.S. 456, 465 (1996).

Criminal convictions and sentences frequently have legal consequences that extend well beyond the direct criminal penalties, including social and economic barriers to individuals reentering society.¹⁹ A single mother who is arrested for a jailable offense could face the harsh reality of being unable to care for her child, and may even risk losing custody, consequences that a defendant who is not a parent would not face. Similarly, a low-income individual with a job that barely allows him to support his family would hope to avoid losing his job as a result of a minor arrest. Under such circumstances, prosecutors have the freedom and often exercise their discretion to offer a plea that will mitigate this disproportionate harm while still promoting public safety. Though such use of discretion is not always formalized in a policy memo, it is routinely exercised and does not risk violating the Equal Protection rights of defendants differently positioned.

For certain noncitizen defendants, the immigration consequences of a criminal disposition can be even more destructive than the criminal conviction or sentence itself. *Padilla v. Kentucky*, 559 U.S. 356, 368 (2010). In exercising their discretion, prosecutors should consider immigration consequences along with other individual case characteristics in order to arrive at an equitable disposition. A policy requiring prosecutors to consider

immigration-related consequences focuses on one of the more serious considerations that must go into prosecutorial decision-making, but by no means subtracts from the many additional factors that prosecutors consider for each defendant.

It is the prosecutor's prerogative to consider the particularities of a case, including immigration consequences, when deciding how best to protect public safety.²⁰ In fact, a prosecutor's consideration of attendant consequences for certain defendants, but categorical refusal to consider the immigration consequences of those same charging decisions, could itself represent a violation of noncitizen defendants' Equal Protection rights against discrimination based on national origin. *Graham v. Richardson*, 403 U.S. 365 (1971).

V. California Penal Code § 1016.3(b) Legally Requires Prosecutors to Consider Adverse Immigration Consequences.

California Penal Code § 1016.3(b) mandates the following:

The prosecution, in the interests of justice, and in furtherance of the findings and declarations of Section 1016.2, shall consider the avoidance of adverse immigration consequences in the plea negotiation process as one factor in an effort to reach a just resolution.

Prosecutors under California law are required to consider avoiding immigration-specific adverse consequences.²¹ Cal. Penal Code § 1016.3(b) does not mandate that prosecutors accept alternative pleas or sentences in any particular circumstances, but does mandate the consideration of the immigration impact of a charge or sentencing recommendation. Since the facts of every offense are different and each defendant might face distinct adverse consequences, each case must be evaluated on its merits in order to achieve a just resolution.²²

Compliance with higher law is an established compelling interest for purposes of the Equal Protection Clause. See *e.g. Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017) (recognizing the longstanding assumption that compliance with operative portions of the Voting Rights Act constitutes a compelling interest). Because California law *requires* prosecutors to “consider the avoidance of adverse immigration consequences in the plea negotiation process,” a local District Attorney policy that mandates such consideration is narrowly designed to achieve this justifiable state interest. See Cal. Penal Code § 1016.3(b).

End Notes

- ¹ See *Saving Families: Uncovering Unintended Consequences, Rebuilding a Nation*, Race Forward (2011), https://www.raceforward.org/system/files/pdf/reports/shattered_families_book_12-11.pdf, (finding that more than 22 percent of all deportees are parents and an estimated 5,100 children in foster care had a detained or deported parent in 2011.); Randy Capps, et al., *Deferred Action for Unauthorized Immigrant Parents: Analysis of DAPA's Potential Effects on Families and Children*, Washington, DC: Migration Policy Institute (2016), 19, <http://www.migrationpolicy.org/research/deferred-action-unauthorized-immigrant-parents-analysis-dapaspotential-effects-families>, (Families subjected to immigration enforcement in six locations lost on average 70 percent of their income within six months of a parent's immigration-related arrest, detention, or deportation; After the deportation and/or deportation of a parent, a child's risk of experiencing mental health problems like depression, anxiety, and severe psychological distress increases.); Vargas, E.D., *Immigration Enforcement and Mixed-Status Families: The Effects of Risk of Deportation on Medicaid Use*, Child and Youth Services Review (2015), 57, 83-39 (Study found that an increase in risk of deportation is associated with a decrease in Medicaid use by mothers); Jacob S. Rugh and Matthew Hall, *Deporting the American Dream: Immigration Enforcement and Latino Foreclosures*, Sociological Science 3 (2016): 1053-1076, <https://www.sociologicalscience.com/articles-v3-46-1053/>. (A study of immigration enforcement found that deportations exacerbate rates of foreclosure among Latinos by removing income earners from owner-occupied households.)
- ² Deportation following a criminal conviction can have significant and often devastating impacts on the emotional and financial well-being of community members, including victims of crimes. Such impacts can include separation of families, significantly increased risks of involvement of children in criminal behavior, victims left without marital or child support, and families facing economic crises. Common financial repercussions of deportation on other community members include food instability, loss of housing, and greater reliance on government assistance programs.
- ³ For example, under California law, a plea to Penal Code misdemeanor domestic violence, § 273.5 could render a noncitizen defendant deportable, but a plea to PC § 243(e) with a maximum possible jail sentence and PC § 1203.097 probation terms could be immigration neutral. *Public-Facing Chart: Selected Immigration Defenses for Selected California Crimes*, January 2019, Immigrant Legal Resource Center, 9-10, https://www.ilrc.org/sites/default/files/resources/pub_facing_ca_chart-20190312v2.pdf.
- ⁴ For example, under California law, a plea to Health & Safety Code § 11358, cultivation of marijuana, an infraction, could be a ground for mandatory deportation—classified as an “aggravated felony” under immigration law—while a plea to a felony strike offense, like Penal Code § 459, residential burglary, could be immigration neutral. See *Id.* at 11.
- ⁵ This is a point of difference between accusations of prosecutorial considerations relating to race compared with race-based admissions policies. The race-based admissions policies at issue in *Grutter* and *Bakke* were brought by individuals who had applied to elite public higher education institutions and were denied admission to schools with only a limited number of spots. See *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). In contrast, since prosecutors are not required to satisfy a certain quota for particular convictions, considering immigration-related consequences for noncitizen defendants should not deleteriously affect citizen defendants.
- ⁶ See e.g. Memorandum from Santa Clara County District Attorney Jeff Rosen re “Collateral Consequences,” https://www.ilrc.org/sites/default/files/resources/unit_7b_4_santa_clara_da_policy.pdf.
- ⁷ See e.g. Office of the District Attorney Contra Costa County, Immigration Policy (May 8, 2019), <https://www.contracosta.ca.gov/DocumentCenter/View/60282/Contra-Costa-DA-Immigration-Policy-2019-PDF?bidId=>; Denver District Attorney's Internal Office Policy Regarding Immigration Collateral Consequences (April 23, 2019), <https://denverimmigrationlawyer.com/wp-content/uploads/2019/04/Immigration-Collateral-Consequences-Final-Policy-April-2019.pdf>; “Acting Brooklyn District Attorney Eric Gonzalez Announces New Policy Regarding Handling of Cases against Non-Citizen Defendants,” (April 24, 2017), <http://www.brooklynnda.org/2017/04/24/acting-brooklyn-district-attorney-eric-gonzalez-announces-new-policy-regarding-handling-of-cases-against-non-citizen-defendants/>.
- ⁸ We note here that national origin has only been categorized as a suspect class for claimants from countries other than the United States, because noncitizens are considered a “discrete and insular” minority. The same cannot be said for United States citizens, who are in the majority. Because the Supreme Court has applied strict scrutiny to race-based claims made by Caucasians, we will assume here that this would also be the case for Equal Protection claims brought by United States citizens, though the Supreme Court has not addressed this question. *Grutter v. Bollinger*, 539 U.S. 306, 326.
- ⁹ Anthony M. Kennedy, Assoc. Justice, Supreme Court of the United States, *Address at the A.B.A. Annual Meeting* (Aug. 9, 2003), <http://tinyurl.com/yakpjkt>.

¹⁰ *Padilla*, 559 U.S. at 373; Anthony M. Kennedy, Assoc. Justice, Supreme Court of the United States, *Address at the A.B.A. Annual Meeting* (Aug. 9, 2003), [http:// tinyurl.com/yakpjkt](http://tinyurl.com/yakpjkt).

¹¹ See District Attorney policies listed *supra* note 3.

¹² American Bar Association [ABA] Standard 3-1.2(b), *Criminal Justice Standards for the Prosecution Function*. Fourth Edition (2017), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/.

¹³ *Ibid.*

¹⁴ Anthony M. Kennedy, Assoc. Justice, Supreme Court of the United States, *Address at the A.B.A. Annual Meeting* (Aug. 9, 2003), [http:// tinyurl.com/yakpjkt](http://tinyurl.com/yakpjkt).

¹⁵ Robert Johnson, National District Attorneys Association, Message from the President (February 14, 2007).

¹⁶ National District Attorney's Association, Message from the President Robert Johnson, February 14, 2007.

¹⁷ American Bar Association [ABA] Standard 3-4.4(vi), *Criminal Justice Standards for the Prosecution Function*. Fourth Edition (2017), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/.

¹⁸ Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 Wash. & Lee L. Rev. 1413, 1414-15 (2010).

¹⁹ Collateral consequences are known to adversely affect adoptions, housing, welfare, immigration, employment, professional licensure, property rights, mobility, and other opportunities—the collective effect of which increases recidivism and undermines meaningful reentry of the convicted for a lifetime. See Michael Pinard, *Reflections and Perspectives on Reentry and Collateral Consequences*, 100 J.L. & Criminology 1213 (2010); Civil Penalties, Social Consequences (Christopher Mele & Teresa Miller eds., 2005); Marlaina Freisthler & Mark A. Godsey, *Going home to Stay: A Review of Collateral Consequences of Conviction, Post-Incarceration Employment, and Recidivism in Ohio*, 36 U. Tol. L. Rev. 532 (2005); Michael Pinard & Anthony C. Thompson, *Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction*, 30 N.Y.U. Rev. L. & Soc. Change 585 (2005); American Bar Association Criminal Justice Section, *Collateral Consequences of Criminal Convictions: Judicial Bench Book*, Office of Justice Programs' National Criminal Justice Reference Service, 11 (2018).

²⁰ American Bar Association [ABA] Standard 3-1.2(b), *Criminal Justice Standards for the Prosecution Function*. Fourth Edition (2017), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/; *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

²¹ "The prosecution, in the interests of justice, and in furtherance of the findings and declarations of Section 1016.2, shall consider the avoidance of adverse immigration consequences in the plea negotiation process as one factor in an effort to reach a just resolution." Cal. Penal Code § 1016.3(b).

²² Case-specific factors to consider might include the severity of the crime, the crime's impact on the victim and on the community, and the history and character of the defendant in addition to the impact of the disposition upon the defendant's present and potential future immigration status.



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