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In a landmark case, *Padilla v. Kentucky*, the U.S. Supreme Court held that the Sixth Amendment to the U.S. Constitution required defense counsel to advise clients who plead guilty that conviction may result in deportation. The Court's rationale was based on the premise that this information was vital to the client's decision-making process. Even so, the Court declined to explore a more reliable ground for developing a narrower understanding of a client's immigration status, particularly the potential effect of the status on common criminal prosecutions, for instance, assault or burglary. This paper submits that under current law, immigration status has a substantial effect on the criminal prosecution and sentencing of immigrants for everyday non-immigration related crimes.

This paper looks into the position of immigrants in the United States, particularly those without legal status, where courts treat unlawful entry or removability as a quasi-crime, thereby affecting the outcome of the case in a way similar to a prior criminal conviction. For immigrants with legal status, deportation is viewed as a quasi-punishment, which potentially mitigates other punishments if deportation or overall penalty would be too severe. This paper suggests that it is fair to all individuals in the United States and aligned with the principles of the criminal justice system to consider immigration status in the criminal process.

Introduction

In a landmark case, *Padilla v. Kentucky*[1], the U.S. Supreme Court held that the Sixth Amendment to the U.S. Constitution required defense counsel to advise clients who plead guilty that conviction may result in deportation. The holding effectively overruled a slew of state supreme court and U.S. Court of Appeals decisions. The Court reasoned that even though deportation was "not, in a strict sense, a criminal sanction," it was, however, "intimately related to the criminal process"[2] since conviction could trigger the deportation process. The court further observed that knowledge of consequences, namely deportation, was instrumental to the decision-making process of clients who are considering pleas.

The Court's rationale premised on the understanding that clients are entitled to know possible outcomes if they were to choose to pursue a particular course of action. *Padilla's* implication to a defense attorney is that the attorney must inform their clients of potential collateral consequences, such as deportation.[3] This development alone effectively makes *Padilla* a landmark case decided by the Court in the twenty-first century. Justice Alito rightfully called *Padilla* a "major upheaval in Sixth Amendment law."[4]

However, the Justices did not fully appreciate the connection between immigration status and criminal prosecution. Writing for the majority, Justice Stevens concluded that only when the immigration consequences were clear, the client had to be advised about the consequences, however, "[w]hen the law is not succinct and straightforward[,] . . . a criminal defense attorney

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

need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences."[5] In effect, the Court held that it was unnecessary to assess the client's immigration status in every case.

Chief Justice Roberts and justices Alito, Scalia, and Thomas stopped even shorter. Writing concurrence in the judgment, Justice Alito and the Chief Justice, concluded that only general warning of deportation was constitutionally required, emphasizing that "a criminal defense attorney should not be required to provide advice on immigration law, a complex specialty that generally lies outside the scope of a criminal defense attorney's expertise."[6] They opined that the function of advice about immigration status was to enable a defendant to make an informed decision about whether to accept or reject a plea. In dissent, writing for himself and Justice Thomas, Justice Scalia argued that the Six Amendment was limited to "those germane to the criminal prosecution at hand – to wit, the sentence that the plea will produce, the higher sentence that conviction after trial might entail, and the chances of such a conviction."[7]

Although the Justices diverged on counsel's duty to inform the client about the immigration aspect, all nine concurred that immigration status and the criminal process were functionally distinct.[8]

However, practitioners and scholars alike recognize that immigration and the criminal justice system are connected; for instance, immigration law making criminal conviction grounds

[5] *Id.* at 1483 (majority opinion).
[6] *Id.* at 1494 (Alito, J., concurring in the judgment).
[7] *Id.* at 1495 (Scalia, J., dissenting).
[8] Justices followed preexisting law. *See, e.g.,* U.S. v. Amador-Leal, 276 F.3d 511, 516 (9th Cir. 2002) ("[D]eportation [is] a 'purely civil action' separate and distinct from a criminal proceeding." (quoting INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984))); *see also* Villafuerte v. INS, 235 F. Supp. 2d 758, 761 (N.D. Ohio 2002) ("Deportation of an alien is a civil proceeding separate and independent from the criminal proceeding."); State v. montalban, 810 So. 2d 1106, 1109 (La. 2002).

for deportation.[9] An increase in the use of federal criminal prosecutions[10] and local authorities[11] to enforce immigration policy[12] has also been a subject of criticism. On the other hand, ordinary, non-immigration criminal prosecution of noncitizens, courts, practitioners, and scholars agree that the criminal justice system and immigration status are separate.

This paper suggests that the *Padilla* Court overlooked an essential connection between crime and immigration. In recent years, Courts and legislature made a person's immigration status a pervasively important factor in every aspect of a criminal process. Deportation and other features of immigration status have become vital considerations in the disposition of a criminal case. They could no longer be considered "separate and independent from the criminal proceeding."[13] Immigration status influences the proceedings from bail through the execution of a sentence. Immigrants represent over 10 percent of the U.S. population, which translates into a similar percentage of the prison population; hence rules applicable to immigrants have substantial effects.[14]

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

[10] *See, e.g.,* Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281 (2010); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469 (2007); Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289 (2008); Maria Isabel Medina, *The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud*, 5 GEO. MASON L. REV. 669 (1997).

[11] This literature focuses on use of state and local law enforcement to carry out immigration policy. *See, e.g.*, David A. Harris, *The War on Terror, Local Police, and Immigration Enforcement: A Curious Tale of Police Power in Post–9/11 America*, 38 RUTGERS L.J. 1 (2006); Huyen Pham, *The Private Enforcement of Immigration Laws*, 96 GEO. L.J. 777 (2008); Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084 (2004).

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

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

[14] Immigrants tend to remain in the state of entry to the U.S. The ten states with the largest immigrant population are California, New York, New Jersey, Illinois, Georgia, Massachusetts, Arizona, and Virginia. STEVEN A. CAMAROTA, CTR. FOR IMMIGRATION STUDIES, IMMIGRANTS IN THE UNITED STATES, 2007: A PROFILE OF AMERICA'S FOREIGN-BORN POPULATION 6 (2007). These states have over two-thirds of the U.S. immigrant population, where the first four account for nearly half. *Id.* at 7. As such, the criminal justice system's policies of those states unduly represent the overall U.S. policy towards immigrants.

The effects of immigration status in criminal prosecution could be divided into two broad categories: advantages and disadvantages. Advantages, as described in Point I, represent the effects of immigration status at the onset of the criminal process. Considering the significance of deportation of those rooted in the U.S., certain jurisdictions make it possible, in some instances, to avoid deportation altogether or to receive a reduced sentence.[15] This practice means that if an immigrant and a citizen with an identical criminal record, if any, commit the same crime with the same level of culpability, the immigrant might receive less prison time by being release early for deportation or may receive a reduced sentence to avoid deportation altogether.

As for the disadvantages, as described in Point II, a series of doctrines treat undocumented immigrants less favorable than a citizen, even less than a documented immigrant. In practice, the rules treat undocumented immigrants as if they committed a crime though not convicted since unlawful entry is a crime *per se*, and is treated as a quasi-crime. Court decisions and statutes provide the undocumented status could be the basis for denying bail, which may adversely affect the outcome of the case.[16] Also, under evidence law, unlawful entry into the U.S. may be the ground for impeachment since the conduct is indicative of dishonesty or bias.[17] Convicted of a crime, an undocumented immigrant may be denied probation or a non-prison alternative.[18] Certain jurisdictions consider undocumented status as an aggravating circumstance, which usually results in a higher sentence.[19]

These legal doctrines illustrate the importance not only of counsel's understanding of implications of the immigration status where the client may be deported, but the awareness of the

[15] *See infra* notes 22-50.
[16] *See infra* notes 51-59.
[17] *See infra* notes 60-64.
[18] *See infra* note 65.
[19] *See infra* notes 66-70.

exact immigration status of the client. Such an approach requires counsel to be more attentive to provide competent representation, far more than the *Padilla* Court has recognized.

The legitimacy and desirability of the links between immigration and the criminal process are questionable at best. Doctrines making the immigration status a key element of the criminal case should be eliminated, or the very least kept separate from the criminal justice system, as a matter of principle, so as not to create a multi-tier criminal justice system.

Point III attempts to explore normative desirability of considering the immigration status for or against an immigrant.[20] Though it concludes that the doctrines are consistent with general principles of criminal law and policy, making immigration status an integral part of the process, the doctrines contain unfair disadvantage to immigrants; hence the separation is favored. However, some doctrines directly advantageous to immigrants, so strict separation would impose hardships. Some provisions are difficult to evaluate, for example, the impeachment rule. For instance, impeaching an undocumented immigrant witness for the prosecution would help documented or undocumented defendants alike. The proposition is that doctrines affecting defendants based on immigration status be reformed and applied in warranted cases.

Further, Point III explores the merits of the early release of alternative punishment of immigrants facing criminal charges.[21] The proposition is that constitutionally deportation is not "punishment," it has all the elements of punishment and should be regarded as quasi-punishment.

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[20] *See infra* notes 72-91. Immigrants are too freely removed form the U.S. for minor offenses. *See, e.g.,* ABA Criminal Justice Section Comm'n on Immigration, *Recommendation 300 (06M300)*, adopted by the House of Delegates in 2006, *available at* https://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_policy_my06300.pdf (proposing limits on deportation). Nevertheless, deportation is a feature of federsl law. The article is aimed at criminal prosecutors, defenders, courts, and legislatures structuring the criminal justice system. Since none of aforentined control deportation law, the existence of deportation is assumed.

[21] *See infra* notes 92-96.

In this sense, if deportation coupled with other sanction would be excessive, then a prosecutor or court would be justified in mitigating the overall punishment. Such an approach would allow making sanctions consistent between individuals who will be deported and who will not.

In conclusion, this paper proposes a balance to promote structure and reform rather than the complete elimination of the connection between immigration and the criminal justice system.

I. Immigrant's Advantages.

In certain instances, immigrants enjoy advantages in the criminal justice system. Immigrants positioned better for plea bargains and sentences to avoid deportation. If deportation is unavoidable, some courts and prosecutors impose or offer reduced sentences. Federal law allows for the early release of state and federal inmates for deportation purposes. These advantages are only available to immigrants.

A. Charges and Pleas Designed to Avoid Effect on Immigration

The majority of jurisdictions require judges to notify defendants of a possibility of deportation resulting from a criminal conviction before a guilty plea[22] pursuant to a rule or statute.[23] Some states, Colorado and Indiana, for example, impose the duty by case law.[24] In all

[22] *See e.g.,* ARIZ. R. CRIM. P. 17.2(f) (2011); CAL. PENAL CODE § 1016.5 (West 2008); CONN. GEN. STAT. ANN. § 54-1j (West 2001); D.C. CODE § 16-713 (LexisNexis 2008); FLA. R. CRIM. P. 3.172(c)(8) (2010); GA. CODE. ANN. § 17-7-93(c) (2008); 725 ILL. COMP. STAT. ANN. 5/113-8 (West 2006); KY. COURT OF JUSTICE, MOTION TO ENTER GUILTY PLEA ¶ 11 (2008), *available at* https://dpa.ky.gov/Public_Defender_Resources/Documents/MotionEnterGuiltyPlea.pdf; NEW JERSEY JUDICIARY, PLEA FORM, ¶17 (2009), *available at* http://www.judiciary.state.nj.us/forms/10079_main_plea_form.pdf (promulgated pursuant to N.J. R. CRIM. P. 3-9); N.Y. CRIM. PROC. LAW § 220.50(7) (McKinney Supp. 2011) (to be repealed Sept. 1, 2021); U.S. DIST. CT. FOR THE DIST. OF COLO., *Statement by Defendant in Advance of Plea of Guilty*, *in* LOCAL RULES OF PRACTICE, App. K ¶ 5 (2012), *available at* http://www.cod.uscourts.gov/Portals/0/Documents/LocalRules/2012-LR/Statement_In_Advance_of_Plea.pdf (form guilty plea notification requiring acknowledgement of possible deportation). This is not an exhaustive list.

[23] *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), requiring defense attorney to advise about immigration consequences.

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

of these states, it is a matter of policy rather than state constitutional requirement. In theory, the notice could be required as a matter of information. However, deportation could occur irrespective of whether the conviction is a result of a plea or trial. There is no rule requiring the notice before trial. As such, notice is colloquially a notice, not an explanation. The rules are better illustrated contextually - deportation being at issue in the criminal case - so to be considered at the plea bargaining.[25]

In *Padilla v. Kentucky*[26], the Court recognized the legitimacy of the bargaining. The Court reasoned that awareness of immigration consequences could benefit both sides.[27]

Even before *Padilla*, prosecutors in some jurisdictions considered immigration status negotiating plea bargains. Principles of prosecution were embodied in NDAA's *National Prosecution Standards* and the *United States Attorneys' Manual* to allow consideration of collateral consequences.[28] Accordingly, defense counsel and prosecutors consider lesser charges, non-prosecution or diversion to avoid deportation.

B. Avoiding Deportation at Sentencing

Some appellate courts agree that immigration status is a legitimate factor and allow trial courts to impose a sentence structured to avoid deportation.[29] This is crucial, especially when an

[25] *See e.g.,* HAW. REV. STAT. ANN. § 802E-1 ("[T]he court in such cases shall grant the defendant a reasonable amount of time to negotiate with the prosecuting agency in the event the defendant or the defendant's counsel was unaware of the possibility of deportation ").
[26] 130 S. Ct. 1473.
[27] *Id.* at 1486.
[28] NAT'L DIST. ATTORNEYS ASS'N, NATIONAL PROSECUTION STANDARDS 4-1.3(k) (3d ed. 2010) ("undue hardship to the accused" can be a basis not to charge or to offer or accept a particular plea); UNITED STATES ATTORNEYS' MANUAL § 9-28.1000(A) (2008), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm#9-28.1000 ("prosecutors may consider the collateral consequences" in determining "whether to charge" and "how to resolve" a case).
[29] *See* N.Y. CRIM. PROC. LAW § 216.05(4)(b) (McKinney Supp. 2011) (allowing participation in diversion program without a plea of guilty "based on a finding of exceptional circumstances . . . [that] exist when, regardless

immigrant is in the U.S. legitimately, and the only ground for deportation would be a criminal conviction. Courts around the country recognize "significant consequences to the defendant…."[30] Some courts go as far as finding that attorney's failure to negotiate a plea for a non-deportable offense constitutes ineffective assistance of counsel.[31]

While the majority of courts adopt the approach, a few courts go the other way.[32] Although there is a split of authority, appellate decisions unanimously hold that unanticipated consequence of deportation is not a legitimate basis to withdraw a guilty plea. [33]

C. Deportation is Exchange for Reduced Sentence

Concessions in exchange for a defendant's agreement to deportation sometimes practiced in state and federal courts. Though state courts cannot remove an immigrant,[34] they could persuade the departure of the deportables.[35] For example, in Roman Polanski's child rape prosecution, the plea agreement allowed him to "voluntarily deport himself."[36] Although the legitimacy of the practice is questionable, the agreement as a whole, namely probation

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of the ultimate disposition of the case, the entry of a plea of guilty is likely to result in severe collateral consequences").

[30] *State v. Tinoco-Perez*, 179 P.3d 363,365 (Idaho Ct. App. 2008).

[31] *People v. Bautista*, 8 Cal. Rptr. 3d862, 870 (Ct. App. 2004).

[32] *See e.g., United States v. Nnanna,* 7 F.3d 420, 422 (5th Cir. 1993) ("Collateral consequences, such as the likelihood of deportation or ineligibility for more lenient conditions of imprisonment, that an alien may incur following a federal conviction are not a basis for downward departure.")

[33] *Compare Reyna v. Commonwealth*, 217 S.W.3d 274, 276 (Ky. Ct. App. 2007), *Commonwealth v. DeJesus*, 795 N.E.2d 547, 552 (Mass. 2003) (holding that the possibility of deportation is not a basis for changing a sentence after it has been rendered), *Commonwealth v. Quispe*, 744 N.E.2d 21, 24 (Mass. 2001) (holding that a court may not dismiss prosecution to avoid deportation), *with United States v. Bonilla*, No. 09-10307, 2011 WL 833293 (9th Cir. Mar. 11, 2011) (holding that defense counsel's failure to provide requested advice on immigration consequences warrants withdrawal of a plea). *But cf*. People v. Mendoza, 90 Cal. Rptr. 3d 315 (Ct. App. 2009) (holding that a trial court could not resentence to 364 days after the term was completed).

[34] *See* 8 U.S.C. § 1229a(a)(1) (2006) ("An immigration judge shall conduct proceedings for deciding the inadmissibility or deportability of an alien.").

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

[36] *Polanski v. Superior Court*, 102 Cal. Rptr. 3d 696, 706 (Ct. App. 2009).

conditions, including those requiring cooperation with immigration authorities, does not impede federal prerogatives.[37]

Federal courts are immediately involved in deportation because of Congress incorporated deportation into federal plea bargaining and sentencing guidelines authorizing stipulation of deportability.[38]Also, Congress allowed deportation as a probation condition, though by agreement.[39] In any event, deportation as part of a plea bargain or a probationary sentence requires the defendant's affirmative consent, recognizing that deportation can be a bargaining chip in negotiations of a plea agreement. As such, prosecutors sometimes agree to a downward departure in exchange for consent to deportation.[40]

The U.S. Sentencing Guidelines allow courts to mitigate a sentence[41]in exchange for the defendant's agreement not to contest deportation.[42]However, the majority of circuits hold that an immigrant must retain some justifiable basis to avoid deportation. Sentencing Guidelines provide a rigid range of a sentence; however, without any special justification or rationale. As a result, courts sometimes deviate and hold that immigration status warrants downward departure below the provisions of the guidelines.

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[37] *See State v. Yanez*, 782 N.E.2d 146, 155 (Ohio Ct. App. 2002) (noting that deportation can affect sentence); *State v. Rodriguez*, 45 P.3d 541, 547 (Wash. 2002) (noting that a prosecution witness pleaded guilty to a separate charge because "the prosecutor agreed to recommend his deportation instead of a jail sentence").
[38] 8 U.S.C. § 1228(c)(5) (2006).
[39] 18 U.S.C § 3563(b)(21) (2006).
[40] *See, e.g.*, Plea Agreement at 6, *United States v. Bernal-Castillo*, No. 1:06CR487 (N.D. Ohio June 20, 2007), 2007 WL 4818673 ("In exchange for the defendant's agreement not to contest deportation/removal, the United States agrees that a one (1) level downward departure . . . is justified . . . pursuant to U.S.S.G. § 5K2.0.").
[41] *See United States v. Booker*, 543 U.S. 220 (2005).
[42] *See United States v. Pacheco-Soto*, 386 F. Supp. 2d 1198, 1206–07 (D.N.M. 2005) (granting downward departure based on deportable alien status).

D. Alleviation of Burdens Caused by Program and Housing Ineligibility

Incarceration in the federal correctional system renders illegal immigrants ineligible for a drug treatment program, a valuable resource that could reduce sentence upon completion.[43] Inmates, subjects to immigration detainers regardless of immigration status rendered deportable by conviction, are ineligible for early release.[44] Federal courts consistently upheld the ineligibility.[45]

Courts, recognizing that immigrants could be subjected to harsher conditions of confinement, sometimes offer a form of mitigation. The Seventh Circuit observed that "status as a deportable alien is relevant … as it may lead to conditions of confinement, or other incidents of punishment, that are substantially more onerous that the framers of the guidelines contemplated."[46] Plea agreements are structured, considering program ineligibility.[47]

E. Early Release for Deportation

Federal and state legislatures granted immigrants an extraordinary advantage.[48] Unlike U.S. citizens, immigrants may be released before the completion of their sentence.[49] However, this advantage is only attainable through deportation, which could be obtained only by request of the attorney general for federal inmates or by the request of a relevant state official for state

[43] 18 U.S.C. § 3621(e)(2)(B).
[44] 28 C.F.R. § 550.55(b)(1) (2010).
[45] *Reyes-Morales v. Wells*, 766 F. Supp. 2d 1349 (S.D. Ga. 2011)
[46] *United States v. Guman*, 236 F.3d 830, 834 (7th Cir. 2001).
[47] *See e.g.,* Plea Offer at 3*, United States v. Salazar-Zuniga,* No. 1:06-cr-239-RWR (D.D.C. Dec. 8, 2006), 2006 WL 4979440 ("[A] downward departure of six (6) months, no more and no less, is warranted, based on your client's status as a deportable alien, pursuant to *United States v. Smith,* and U.S.S.G. § 5K2.0(2)(B)."
[48] That is if the individual would rather be free outside of the U.S.
[49] 8 U.S.C. § 1231(a)(4)(B) (2006).

inmates. States with large immigrant prisoner populations enacted legislation allowing early release for deportation.[50]

II. Immigrant's Disadvantages

Immigration status could give rise to a series of negative consequences, especially if the immigrant-defendant is removable. Consequences could be the denial of bail, possible impeachment, ineligibility for a deferred or alternative sentence, and the unlawful entry could be an aggravating factor.

A. Denial of Bail

In many jurisdictions, the defendant's immigration status is considered in setting bail, mainly if the defendant is undocumented. Although the Federal Bail Reform Act[51] allows for up to ten-day detention period for unlawful immigrants so to allow immigration enforcement officials time to act, it does not distinguish between citizens and immigrants.[52]

Some states offer a more extreme approach, such as denying bail to certain immigrants charged with serious crimes.[53] Some states have the statutory presumption denying undocumented immigrants to be released on bail.[54] Some states make immigration status a bail

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[50] ARIZ. REV. STAT. ANN. § 41-1604.14(A) (Supp. 2010); CAL. PENAL CODE §§ 3082, 5025 (West 2000); CONN. GEN. STAT. ANN. §§ 54-125d, -130b (West 2009); HAW. REV. STAT. ANN. § 336-5 (LexisNexis 2008); N.Y. EXEC. LAW § 259-i(2)(d) (McKinney 2010); TEX. GOV'T CODE ANN. § 508.146(f) (West Supp. 2010). The list is not exhaustive.

[51] 18 U.S.C. § 3140 (1984).

[52] *Id.* § 3142 (d)(1)(B).

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

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

factor.[55] Illinois statute lists factors for courts to consider.[56] Other jurisdictions consider immigration status as a bail factor by case law.[57]

There no statutes or cases directly or indirectly prohibiting consideration of immigration status as a factor in setting bail. The objective of bail in a criminal case is to secure the appearance of the accused in court, hence accounting for immigration status is a logical solution, especially in circumstances where the immigrant-defendant faces a possibility of deportation irrespective of the outcome of the process.

There are two main reasons for not appearing at trial. First, if a conviction will result in deportation, the defendant would instead depart before serving a sentence rather than after imprisonment. Second, pursuant to the Immigration and Nationality Act, a deportable immigrant remain deportable even if the charge is a state criminal offense.[58]So, if an immigrant is deportable, notwithstanding the outcome of the criminal process, the state must keep the defendant in custody or prevent departure from the U.S.[59] It would be futile to try to incarcerate the defendant after deportation or voluntary departure. The situation is different; however if the immigrant-defendant is having or seeking a legal basis to remain in the U.S, who have the

[55] S.C. CODE ANN. § 17-15-30(B)(4) (Supp. 2010) (considering as a bail factor "whether the accused is an alien unlawfully present in the United States, and poses a substantial flight risk due to this status").
[56] 725 ILL. COMP. STAT. ANN. 5/110-5(a) (West 2006 & Supp. 2011) (allowing courts to consider whether a noncitizen "is lawfully admitted," whether the country of citizenship "maintains an extradition treaty with the United States," "whether the defendant is currently subject to deportation or exclusion," and whether a citizen-defendant "is considered under the law of any foreign state a national of that state for the purposes of extradition or nonextradition to the United States").
[57] *See Hernandez v. State,* 669 S.E.2d 434, 435 (Ga. Ct. App. 2008) (upholding $1,000,000 bail because "Hernandez's counsel conceded that Hernandez is not a United States citizen, and Hernandez presented no evidence that he was in this country legally"); *Commonwealth v. Padilla*, 253 S.W.3d 482, 483 (Ky. 2008), rev'd, 130 S. Ct. 1473 (2010); *State v. Fajardo-Santos*, 973 A.2d 933, 939 (N.J. 2009) ("When bail is set, it is entirely appropriate to consider a defendant's immigration status in evaluating the risk of flight or nonappearance."); *People ex rel. Morales v. Warden*, 561 N.Y.S.2d 587 (App. Div. 1990).
[58] 8 U.S.C. § 1231(a)(4)(A) (2006) ("[T]he Attorney General may not remove an alien who is sentenced to imprisonment until the alien is released from imprisonment. Parole, supervised release, probation, or possibility of arrest or further imprisonment is not a reason to defer removal.").
[59] 8 C.F.R. § 215.3(g) (2010).

incentive to comply with release requirements or to avoid conviction. Contrastingly, an immigrant, dual citizen, or a citizen with foreign contacts may abscond faced with serious charges.

Consideration of immigration status will result in denial of bail or setting bail the defendant unable to make, regardless of being one of the factors or automatic ineligibility. In turn, increasing the chance of conviction.

Though the disparity between the detained and the released is not an exact science, the denial of bail correlates with conviction because of the four factors. First, while in jail, an individual may be pressured to take a plea, notably if the plea to probation or time served. Second, those released on bail wait longer for trial, and that favors defendants since witnesses disappear and memories fade. Third, the ability of the detained individual to meet with their attorney is significantly curtailed. Fourth, detained individual ordinarily earns no income, hence negating the ability to pay for counsel or to engage in rehabilitation to impress court at sentencing.

B. Impeachment of Undocumented Immigrant Witnesses

In the federal system and jurisdictions following the Federal Rules of Evidence, removable immigration status or unlawful entry can be ground to impeach the credibility of a witness, including the defendant. Witnesses subject to impeachment might choose not to take the stand, possibly withholding helpful testimony, increasing the likelihood of conviction. If the defendant testifies and then is impeached on the ground of unlawful entry into the U.S., the risk is far too significant that the jury will not consider conduct affecting the credibility, but instead will convict the defendant on prejudice against undocumented immigrants.

Certain aspects of impeachment are straight forward. Not being a U.S. citizen *per se* is not ground for impeachment since it does not show untruthfulness. Parties are entitled to cross-examine a witness to establish whether the witness received a benefit for testimony or convicted of a felony, for instance, an immigration offense.[60]

More complex is impeachment based on unlawful entry or undocumented immigration status. Courts advance two theories for impeachment based on status or entry: bias and prior bad act. Potential benefits available to undocumented prosecution witnesses are substantial – there are three visa categories available to witnesses or victims in federal and state criminal cases.[61]Also, immigration authorities are not required to initiate proceedings against unlawfully present.[62] As a result, undocumented government witnesses have hopes and fears stemming from their interaction with police and prosecutors in criminal cases. This may be a reasonable basis for impeachment. However, the defendant cannot be impeached on bias grounds. A defendant cannot be accused of manipulating testimony to avoid deportation. A defendant has a clear interest to offer exculpatory testimony in every case without impeachment.

The alternate theory, potentially applicable to any witness as well as a defendant, is that unlawful entry into the U.S. is a bad act. The critical question is whether the unlawful entry is a

[60] FED. R. EVID. 609.
[61] S visas for witnesses and informants. Immigration and Nationality Act § 101(a)(15)(S), 8 U.S.C. § 1101(a)(15)(S) (2006). T visas to victims of trafficking and their families. *Id.* § 101(a)(15)(T). U visas to victims of certain crimes and their families. *Id.* § 101(a)(15)(U). State and federal law enforcement agencies help obtain the visas. *See* 8 C.F.R. § 214.14(2010).
[62] Immigration authorities may grant formal "deferred action" status when they decline to initiate proceedings against someone who they believe to be deportable. Those with deferred action may be authorized to work. 8 C.F.R. § 274a.12(c)(14).

bad act indicating dishonesty. Many jurisdictions answer that it can.[63] However, courts recognize that such impeachment is subject to the trial court's discretion.

The rule requires impeachment on a specific instance of "conduct,"[64] not status, so impeachment must be connected to an act, unlawful entry, for example. Alternatively, working in the U.S. without authorization using forged documents or false names. Such conduct is criminal *per se,* and impeachment is warranted.

C. Ineligibility for Non-Prison Sentences

Undocumented status is significant at sentencing. Being undocumented is a factor preventing non-prison disposition such as drug treatment, probation, or work release. Certain states statutorily limit the eligibility of removable immigrants.[65]

There are two reasons for considering immigration status at sentencing. Some courts see undocumented immigrants as unwilling to obey the law and unsuitable for probation.

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[63] *See Toliver v. Hulick,* 470 F.3d 1204, 1207 (7th Cir. 2006) (noting that the defendant should have been allowed to cross-examine on immigration status, but holding that this was not a basis for habeas corpus); *id*. ("If he had said he was an illegal immigrant, then his status would have been out in the open and could have been used to impeach his credibility. There seems little legitimate reason to have restricted the inquiry ").

[64] *See* FED. R. EVID. 608(b).

[65] WASH. REV. CODE ANN. § 9.94A.660(1)(e) (West 2010) (stating that a drug offender sentencing alternative is available if "[t]he offender has not been found by the United States attorney general to be subject to a deportation detainer or order and does not become subject to a deportation order during the period of the sentence"); *id*. § 9.94A.690(3)(d) (stating the same for the work-ethic camp alternative); GA. CODE ANN. § 17-10-1.3(c) (2008) provides:

If the court determines that the person to be sentenced would be legally subject to deportation from the United States while serving a probated sentence, the court may:

(1) Consider the interest of the state in securing certain and complete execution of its judicial sentences in criminal and quasi-criminal cases;

(2) Consider the likelihood that deportation may intervene to frustrate that state interest if probation is granted; and

(3) Where appropriate, decline to probate a sentence in furtherance of the state interest in certain and complete execution of sentences.

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

Other courts reason that individuals subject to deportation are unlikely to comply with the terms of probation.

D. Unlawful Entry as an Aggravating Factor

A court may not aggravate a sentence based on a defendant's alienage, ethnicity, nationality, or race.[66]However, courts in some jurisdictions[67] held that a specific subset of immigrants may receive a higher sentence for unlawful entry.[68] The courts also held that "disregard for the law" accompany the unlawful entry is the reason for increasing a sentence.[69] The Tenth Circuit held back no punches: "Entering the United States illegally is a federal crime. A sentencing court is at liberty to consider such prior conduct when sentencing a defendant for a different and unrelated crime."[70]

III. Quasi-Crime and Punishment

Points I and II illustrate that citizens and immigrants do not enjoy the same treatment in the criminal justice system. Three individuals committing the same crime at the same time, having identical backgrounds, will be taken down different paths because of immigration status. Under the usual disposition for the offense, a citizen might receive probation, an undocumented

[66] *See United States v. Leung*, 40 F.3d 577, 586–87 (2d Cir. 1994); United States v. Onwuemene, 933 F.2d 650, 651 (8th Cir. 1991) (holding that the defendant's right to due process was violated when the court imposed a harsher sentence based on his national origin and alienage (citing United States v. Borrero-Isaza, 887 F.2d 1349, 1352 (9th Cir. 1989))).
[67] *See State v. Gonzalez*, 796 N.E.2d 12, 37 (Ohio Ct. App. 2003) (accepting as valid aggravating facts that "Gonzalez had convictions for other crimes, and that he had an INS detainer currently on him for being in the country illegally"); *Infante v. State*, 25 S.W.3d 725, 727 (Tex. App. 2000) ("If the trial court had taken appellant's status as an illegal alien into account, no error would have been committed."); *People v. Guerra*, No. 283133, 2009 WL 1397145, at *2 (Mich. Ct. App. May 19, 2009) ("[A] substantial and compelling factor that supported the sentence departure was the fact that defendant repeatedly came into this country illegally and committed crimes, particularly home invasions.").
[68] *See People v. Medina*, 851 N.E.2d 1220, 1223 (Ill. 2006) (rejecting the claim that the sentence was excessive and noting without criticism that the defendant's undocumented status was advanced as a basis for the sentence).
[69] *See State v. Alcala*, No. 2 CA-CR 2007-0161, 2008 WL 2756496, at *5 (Ariz. Ct. App. May 8, 2008).
[70] *See United States v. Garcia-Cardenas*, 242 F. App'x 579, 583 (10th Cir. 2007) (citations omitted).

immigrant might be held without bail, denied probation, and the undocumented status may aggravate the sentence of incarceration. In contrast, a documented immigrant might avoid conviction by participating in a diversion program or plead guilty and receive a lesser sentence so to avoid deportation. As such, immigration status effectively renders defendants worse off, or better off, than any other defendants in the criminal justice system.

Viewed as revolutionary at the time of the decision, *Padilla v. Kentucky*,[71] failed to capture the full effect of immigration status on a criminal case. Defense counsel must account for an immigrant client's status and potential consequences of a conviction. The two possible approaches to address the problem emerge. First, require defense attorneys to be aware of the client's immigration status, in addition to other significant legal and factual considerations. Second, to amend criminal law, procedure, the law of evidence to make immigration status irrelevant to the criminal process.[72]

This section explores objections to the treatment of citizens, documented immigrants, and undocumented immigrants under the current system. The conclusion finds that even though there are risks of imbalanced treatment, the overall process is consistent with principles of due process, and consideration of immigration status at sentencing, in some cases, is warranted. Complete separation of the criminal justice system and immigration status would cause more harm than good. However, the current state of the criminal justice system is far from perfect; immigration status should be more carefully considered than it is today.

[71] 130 S. Ct. 1473 (2010).
[72] *See supra* note 20.

A. Determination of Immigration Status is Complex

Opponents of the use of immigration status in the criminal justice system argue that it requires specialized knowledge without which mistakes are inevitable. Indeed, even if 99 percent of determinations are accurate, the remainder will represent many mistakes as an absolute number.[73] In *Padilla*, the state court, as it turned out, erroneously jailed the defendant because of the misunderstanding of his immigration status.[74] However, the determination could be beneficial as well as burdening to immigrants. There will always be mistakes in the application of immigration status, but prosecutors and courts should not be concerned about their decision will result in deportation – deportation is not guaranteed. Prosecutors and judges exercise discretion to achieve justice, completely discounting immigration status to avoid hardships to a defendant would be unfair.

There will be instances where a defendant's immigration status is crystal-clear; otherwise, it is a gray area in evaluation. Crucial questions are (a) whether the defendant entered the U.S. unlawfully, and (b) whether a conviction will constitute aggravated felony requiring deportation even of a lawful immigrant. In the current criminal justice system, it is up to lawyers and judges to answer these questions. If defense attorneys recognize that immigration status is an integral part of their job, then they will get better at it.

[73] *See e.g., State v. Pablo,* No. W2007-02020-CCA-R3-CD, 2008 WL 2938090, at 1 (Tenn. Crim. App. July 30, 2008) (reversing denial of probation to an "illegal alien" based on insufficient evidence of status).
[74] *Commonwealth v. Padilla*, 253 S.W.3d 482, 483 (Ky. 2008) ("Appellee's bond was changed because he was suspected of being an illegal alien . . . ."), *rev'd*, 130 S. Ct. 1473 ("Petitioner . . . has been a lawful permanent resident of the United States for more than 40 years.").

B. The Racism Problem

Another argument is that undocumented status is akin to racial discrimination. Courts in certain jurisdictions held that undocumented immigration status cannot be considered at sentencing[75] nor for impeachment purposes.[76] Applying state law, these courts found that immigration status is similar to consideration of race or national origin. These are alluring holdings. Nevertheless, unlawful entry into the U.S. is a federal crime for which people are imprisoned.[77]

Impeaching a defendant for unlawful entry or remaining in the U.S. requires discrimination because of citizenship, or lack thereof. However, consideration of immigration status doe not trigger the level of scrutiny as classification based on race.[78] The disadvantages are permissible and are particularly evident in federal prosecutions. Congress regulates immigration and naturalization as the Supreme Court pointed out that "[Congress] exercise[s] its broad power over naturalization and immigration."[79] Undoubtedly, federal statutes making immigration status an element of an offense[80] or a sentencing factor are constitutional, even if they apply only to immigrants. States usually do not interfere with federal immigration policy by

[75] *Martinez v. State*, 961 P.2d 143, 145 (Nev. 1998) ("Thus, the district court here violated appellants' due process rights, if it based its sentencing decision, in part, upon appellants' status as illegal aliens.").
[76] *Sandoval v. State*, 442 S.E.2d 746, 747 (Ga. 1994) ("[A]n appeal to national or other prejudice is improper . . . and evidence as to . . . race, color, or nationality . . . is not admissible, where such evidence is introduced for such purpose and is not relevant to any issue in the action [T]his rule is equally applicable to evidence as to an individual's immigration status."); *State v. Avendano- Lopez*, 904 P.2d 324, 331 (Wash. Ct. App. 1995) (holding that impeachment based on illegal alien status is the equivalent of impeachment based on nationality or other impermissible prejudice).
[77] *See* 8 U.S.C. §§ 1321-30 (2006).
[78] *See e.g., Plyler v. Doe*, 457 U.S. 202, 223 (1982) ("Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a 'constitutional irrelevancy.'").
[79] *Mathews v. Diaz*, 426 U.S. 67, 79–80 (1976).
[80] *See e.g.,* 18 U.S.C. § 922(g)(5) (2006).

considering federal law violations. As such, it is unarguable that disadvantaging undocumented immigrants violates the Equal Protection Clause.

However, courts have become increasingly suspicious of using the undocumented status. Even though it is not a racial classification *per se*, it provides an unimpeded proxy to consideration of race. A majority of undocumented immigrants in the U.S. are Mexican, but that number is dwarfed once other nonwhite immigrants are combined.[81] In effect, while discrimination is not racial discrimination doctrinally, overbroad use could constitute discrimination. This is particularly true in a realm of political controversy, as it is today. Below are general proposals to structuring and limiting the disadvantages of immigrants to be applied legitimately, and not to be used as a tactic for discrimination, and to avoid duality of the criminal justice system.

1. Bail

Immigration status is a legitimate factor as it reflects community ties and flight risk, and therefore ensures the likelihood of appearing for trial. If immigration authorities do not detain or deport a defendant, the bail determination should be made by the application of common factors. An immigrant who entered the U.S. recently and unlawfully certainly presents a significant flight risk. On the other hand, a longtime resident, even who entered unlawfully, may have family and community connections rendering him or her almost indistinguishable from a citizen or a lawful immigrant. Hence, automatic or presumptive detention of an immigrant with community ties is not necessary, even if the person is undocumented.

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

Though some courts uphold the automatic denial of bail to undocumented immigrants,[82] the detention permeates of preconviction punishment.[83] The reinforcement of federal immigration laws is not the purpose of bail.

2. Impeachment

Not everyone entering the U.S. unlawfully committed an impeachable offense. Some undocumented immigrants were brought in as children and are not responsible for their entry or presence. Visa overstayers, potentially removable, but since their entry was in full compliance with applicable law, cannot be impeached. As such, the crucial question of entry would be the factor in the effort to impeach a witness. Some courts reject impeachment on the grounds of immigration status.[84]

The proposal does not call on a total discount on the immigration status because impeachment rests on particular facts and circumstances, which takes time to develop to impeach. Some courts adopted their own versions of Federal Rules of Evidence 608(b), which prohibit impeachment based on acts other than conviction.[85]

As for prosecution's witnesses, a criminal defendant enjoys the Sixth Amendment right of confrontation. Courts are hesitant to deny a defendant an opportunity to cross-examine. Other

[82] *Hernandez v. Lynch*, 167 P.3d 1264 (Ariz. Ct. App. 2007) (upholding a statute denying bail to undocumented noncitizens).
[83] *See Id.* at 1276 n.11 (Kessler, J., concurring) ("[L]egislative intent is important because, if the express intent was to punish persons illegally in the country, Proposition 100 would probably be facially invalid." (citing *United States v. Salerno*, 481 U.S. 739, 747 (1987))); *State v. Blackmer*, 631 A.2d 1134, 1140 (Vt. 1993) ("[B]ail cannot be denied in order to inflict pretrial punishment " (citing *Salerno*, 481 U.S. at 747, 749)).
[84] *People v. Scales*, No. D041118, 2004 WL 1759259 at 7 (Cal. Ct. App. Aug. 6, 2004) (upholding exclusion of immigration status for impeachment purposes).
[85] TEX. R. EVID. 608(b).

witnesses, on the other hand, would inject racial bias, or make laying the foundation difficult. So resort to Rule 403 is warranted.

3. Sentencing

Denial of alternative punishment usually means that the defendant will be sentenced to prison – pity. Considering the immigration status is an acknowledgment that the undocumented immigrant is deportable. The stakes are high and careful investigation by a lawyer will enable a judge to make an accurate prediction if a defendant will be subjected to the deportation process.[86] In jurisdictions with a vast number of the immigrant population, judges setting bail have extensive knowledge of what will happen to an immigrant in various scenarios.

Aggravation of sentences based on unlawful entry as a theory of a past crime, though without conviction, serve as a predicate for aggravation, but must be criminal. Thus, the aggravating factor is inapplicable to an undocumented immigrant who has committed no crime. Overstaying a visa is not a federal criminal offense, so it is not an aggravating factor. Infants and children are not criminally responsible since they lacked culpability, or have a defense of infancy.

Even for the criminally responsible, unlawful entry aggravator may not have the same weight. The connection between the unlawful entry and the crime the defendant is being sentenced should be considered. However, an immigrant who unlawfully entered the U.S. to commit crimes deserves aggravation. That is the purpose of the immigration system – to exclude those who enter illegally to commit crimes. This factor should differentiate when a similar crime

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

is committed. The connection between the unlawful entry and charged crime is purely coincidental. Immigrant, unlawfully entering the U.S. for the purpose of lawful activity, is less culpable than an immigrant entering to commit crimes. Therefore, the sentence should not be aggravated.

Immigration offenses are notoriously underenforced.[87] Immigration officials acknowledge that unlawful entry is unlikely to be resolved by enforcement the same way as drug and traffic offenses.[88] President George W. Bush stated, "Massive deportations of the people here is unrealistic. It's just not going to work."[89] President Obama made a similar statement.[90] President Trump, on the other hand, prefers a different approach.[91] Only time will tell which President is correct. It evident that if civil deportation is off the table, criminal prosecution, an elaborate and expensive process, is unlikely to be utilized to address the issue.

The nature of unlawful entry, no matter how trivial offers insight into the legitimacy of sentence aggravation: whether sentences of non-immigration crimes are also aggravated. Judges should not aggravate sentences merely on unlawful entry into the U.S. unless they also aggravate sentences for other offenses.

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[87] S*ee* Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715 (2006).
[88] Margaret Raymond, *Penumbral Crimes*, 39 AM. CRIM. L. REV. 1395 (2002).
[89] President George W. Bush, Immigration Reform: Address in California (Apr. 24, 2006), *available at* http://www.presidentialrhetoric.com/speeches/04.24.06.html.
[90] President Barack Obama, News Conference in Guadalajara (Aug. 10, 2009), *available at* http://www.nytimes.com/2009/08/11/world/americas/11prexy.text.html ("[W]e can create a system in which you have strong border security, we have an orderly process for people to come in, but we're also giving an opportunity for those who are already in the United States to be able to achieve a pathway to citizenship so that they don't have to live in the shadows, and their children and their grandchildren can have a full participation in the United States.").
[91] President Donald J. Trump, Oval Office Address on Immigration (Jan. 1, 2019), *available at* https://www.politico.com/story/2019/01/08/trump-immigration-speech-full-text-1088710 (" Our proposal was developed by law enforcement professionals and border agents at the department of homeland security. These are the resources they have requested to properly perform their mission and keep America safe. In fact, safer than ever before. The proposal from Homeland Security includes cutting-edge technology for detecting drugs, weapons, illegal contraband and many other things. We have requested more agents, immigration judges, and bed space to process the sharp rise in unlawful migration fueled by our very strong economy.")

C. Deportation – Quasi-Punishment

In *Padilla*, the U.S. Supreme Court adhered to the point that deportation is not a punishment as a matter of constitutionality.[92] However, courts, prosecutors, and legislatures account for deportation in the criminal process. Courts and prosecutors treat immigrants differently than citizens to avoid deportation. Such an approach creates unprincipled favoritism where a citizen serves the full sentence. Leniency based on deportation violates the significant sentencing value that requires the same treatment of similar cases.[93]

There is an argument that deportation is proper when evaluating punishment. A functional perspective dictates that states have no interest in investing in reforming the future conduct of an individual who will not be part of society. The notion is that neither rehabilitation nor prevention of recidivism warrants spending funds on those who will be deported after release from prison.

A citizen, serving more time in prison, would contend that no one should get less punishment they deserve. The utilitarian argument will fail. However, courts understand that even though deportation is not punishment, but is akin punishment. Deportation has become synonymous with punishment. The Court upheld this idea in *Padilla*.[94]

Though not punishment *per se*, deportation has the elements of punishment, making it a quasi-punishment. Law often provides for consideration of quasi-punishments at sentencing, for example, jail time credit. On the contrary, pretrial detention is not punishment.

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[92] *Padilla v. Kentucky*, 130 S. Ct. 1473, 1481 (2010) ("[R]emoval proceedings are civil in nature ").
[93] *See e.g.,* 18 U.S.C. § 3553(a)(6) (2006) (provided that sentence should reflect "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct").
[94] *Padilla v. Kentucky*, 130 S. Ct. 1473, 1481 (2010) ("We have long recognized that deportation is a particularly severe 'penalty'").

The ABA Criminal Justice Standards provide that collateral sanctions should be considered at sentencing.[95] The comments elaborate that "Standard 19-2.4(a) requires a sentencing court to take into account applicable collateral sanctions in fashioning a package of sanctions at sentencing …. [T]he sentencing court should ensure that totality of the penalty in not unduly severe and that it does not give rise to undue disparity."[96]

The possibility of deportation has a different weight depending on circumstances. A person lawfully in the U.S. is entitled to more consideration because of personal connection, which would be severed. This kind of person might lose everything; for this person, deportation is a quasi-punishment. In contrast, a person who entered the U.S. for purposes of committing crimes and has no connections in the country.

A defendant could get a benefit of consideration of the possibility of deportation at sentencing and get an early release for deportation, effectively counting the deportation twice. The sentencing system should evaluate this factor. A court should credit pretrial time spent in jail considering sentencing factors.

[95] STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS 19-2.4(a) (3d ed. 2004).
[96] *Id.* at 19-2.4(a) commentary.

Conclusion

Padilla v. Kentucky, though a landmark case, fell short of a thorough understanding of the importance of immigration status in the criminal justice system. Many jurisdictions now consider immigration status at every level of the criminal process. The criminal justice system and the immigration system have become intimately connected.

The practical importance of immigration status to the criminal case is recognized in the majority of jurisdictions. In a fair criminal justice system, the effects of immigration status are reduced or structured so as not to affect the outcome of a criminal case. This paper proposes that the immigration process should be integral to the criminal process to allow fair and unbiased prosecutions. The connections are legitimate as a matter of principle. Deportation is a quasi-punishment which should be accounted for in charging, plea bargaining, and sentencing to mitigate the effects of unwarranted deportation or is the sentence is followed by deportation.

However, the risk of discriminatory animus based on immigration status is present, and there should be a doctrinal structure to avoid such pitfalls. The immigration status or unlawful entry should not influence bail, impeachment, and sentencing unless facts and circumstances of the case provide a clear basis. All jurisdictions should follow the same principles and doctrines in making immigration status relevant factor, and apply the factor in a seldom and restrained manner.