



Nonserious Marijuana Offenses and Noncitizens: Uncounseled Pleas and Disproportionate Consequences

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ABSTRACT

Marijuana is being decriminalized in many states and localities throughout the United States. While recreational use of marijuana is legal in only a handful of states, in many other areas it has become a type of pseudo-violation with such low criminal penalties that defendants may be issued just a citation or ticket and are often not entitled to the assistance of a public defender. While low-level marijuana offenses have fewer meaningful consequences within the criminal justice system in these jurisdictions, these offenses continue to create serious immigration consequences for noncitizen offenders. The Immigration and Nationality Act defines “conviction” in such a way that even civil infractions with very low penalties count as drug convictions that make lawful permanent residents deportable.

The combination of lowered criminal penalties for marijuana offenses and severe resulting immigration consequences causes significant problems for noncitizens. First, as the penalties for marijuana offenses are lowered at the state and local levels, a defendant is less likely to have a right to appointment of a public defender when charged with possession of a small amount of marijuana. This situation implicates potential violations of the Sixth Amendment right to effective assistance of counsel in criminal proceedings, which has been held to cover affirmative advice on the immigration consequences of a criminal charge. Additionally, even with the assistance of a public defender, individuals may still be unable to avoid the harsh immigration consequences that often result from marijuana offenses. These harsh consequences violate our society’s understanding of proportionality of punishment in criminal law. Even though immigration law is traditionally insulated from proportionality considerations because of the plenary power doctrine, deportation for low-level marijuana offenses provides one example of why this doctrine should be reconsidered.

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INTRODUCTION

On what would otherwise be a fairly unremarkable Sunday afternoon, Alex is arrested for possession of marijuana while driving in his car with a friend.¹ Like one in three Americans,² Alex occasionally uses marijuana and generally has done so without any interference from law enforcement. On this particular occasion, however, the police observe marijuana cigarettes in Alex's car while stopping him for a traffic offense and proceed to arrest him.

At this point, Alex is initiated into a world familiar to many American residents: the criminal justice system.³ He is fingerprinted and photographed at a local precinct, and he then waits in a holding cell with a large group of other recent arrestees for his turn to be brought before a judge. Several hours after his arrival, the local criminal court finally summons Alex to a hearing. By this point, tired and dirty from a sleepless night in jail, Alex is ready to get back home to his family. Alex faces the judge without a lawyer. He cannot afford one, and he is not entitled to the assistance of a public defender, as his charge does not carry the risk of jail time.⁴ Therefore, he quickly pleads guilty to a misdemeanor offense of sharing less than one ounce of marijuana with his friend, and he agrees to pay a fine of no more than one hundred dollars.⁵

Alex's experience, up until this point, is a typical one within the U.S. criminal justice system. In spite of recent moves toward legalization in various states,⁶ marijuana remains classified as a controlled substance, and its recreational use is illegal throughout most of the country. Thus, Alex's arrest is not unusual in the

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1. This is a hypothetical story, meant to illustrate how a noncitizen facing marijuana charges would interact with the criminal justice and immigration systems.
 2. Lydia Saad, *In U.S., 38 Percent Have Tried Marijuana, Little Changed Since '80s*, GALLUP (Aug. 2, 2013), <http://www.gallup.com/poll/163835/tried-marijuana-little-changed-80s.aspx> (finding that 38 percent of Americans reported trying marijuana in their lifetime).
 3. While this hypothetical is fictional, it is based on the experiences of many U.S. residents who are arrested for marijuana possession each year. See, e.g., EZEKIEL EDWARDS ET AL., AM. CIVIL LIBERTIES UNION, *THE WAR ON MARIJUANA IN BLACK AND WHITE* 27–28 (2013), available at <https://www.aclu.org/files/assets/aclu-thewaronmarijuana-rel2.pdf> (describing the experience of Alfredo Carrasquillo, who spent three days in jail after being arrested for marijuana possession, and whose case ended with payment of \$120 in court fees and an agreement to stay out of trouble for one year).
 4. See *infra* Part III for a discussion on the number of jurisdictions that have lowered marijuana possession charges to not carry the risk of incarceration.
 5. See generally CAL. HEALTH & SAFETY CODE § 11360(b) (West 2014) (setting out a maximum punishment of a \$100 fine for “every person who gives away, offers to give away, transports, offers to transport, or attempts to transport not more than 28.5 grams of marijuana,” which is a misdemeanor).
 6. See *infra* Part I.B for an overview of recent decriminalization efforts.

slightest. The Federal Bureau of Investigation (FBI) estimates that police arrest someone for possession of marijuana every forty-eight seconds,⁷ and nearly half of all drug-related arrests in the country are for marijuana use.⁸ But because Alex is not a U.S. citizen, the effects of this marijuana arrest will be anything but typical for him from here on out.

Once a criminal defendant's case has been resolved, unless the sentence imposed involves a future period of confinement, the defendant is ordinarily released. Alex, however, is a lawful permanent resident, and he has just pled guilty to an offense that makes him deportable.⁹ Therefore, unbeknownst to him, after he was fingerprinted, Immigration and Customs Enforcement (ICE) issued an immigration detainer¹⁰ against him, enabling the local jail to hold him for up to an additional forty-eight hours beyond the resolution of his criminal case.¹¹ Thus, after pleading guilty, Alex is returned to criminal custody until an ICE of-

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7. Steven Nelson, *Police Made One Marijuana Arrest Every 42 Seconds in 2012*, U.S. NEWS (Sept. 16, 2013, 2:42 PM), <http://www.usnews.com/news/articles/2013/09/16/police-made-one-marijuana-arrest-every-42-seconds-in-2012>.
 8. EDWARDS ET AL., *supra* note 3, at 14.
 9. Section 237(a) of the Immigration and Nationality Act (INA) lays out the deportability grounds for lawful permanent residents. Lawful permanent residents become deportable upon committing one offense involving a controlled substance, including marijuana, except for "a single offense involving possession for one's own use of 30 grams or less of marijuana." INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i) (2012).
 10. "Any authorized immigration officer may at any time issue a Form I-247, Immigration Detainer-Notice of Action, to any other Federal, State, or local law enforcement agency. A detainer serves to advise another law enforcement agency that the Department seeks custody of an alien presently in the custody of that agency, for the purpose of arresting and removing the alien. The detainer is a request that such agency advise the Department, before release of the alien, in order for the Department to arrange to assume custody, in situations when gaining immediate physical custody is either impracticable or impossible." 8 C.F.R. § 287.7(a) (2012). A lot has been happening in the world of immigration detainers in recent years, as a slew of states and localities have decided not to honor them in light of their questionable legality. See Christopher N. Lasch, *Rendition Resistance*, 92 N.C. L. REV. 149 (2013). But many states and localities have policies that continue to honor detainers for certain supposedly serious crimes, which can often include marijuana offenses. For example, California has prohibited local law enforcement agencies from honoring most immigration detainers, but it would allow an agency to honor an immigration detainer placed on someone charged with social sharing of marijuana, like Alex. See L.A. Police Dep't Jail Div., *Order 18.2.2 No. 5, Revision of Jail Operations Manual Section 2/500 Immigration Detainer Processing* (Dec. 21, 2013), http://www.catrustact.org/uploads/2/5/4/6/25464410/lapd_trust_act_policy.pdf.
 11. Under the Secure Communities program, fingerprints that local jurisdictions share with the Federal Bureau of Investigation (FBI) database are also shared with the Department of Homeland Security (DHS). Immigrations and Customs Enforcement (ICE) then issues detainers against individuals whom it believes to be present in the country in violation of immigration laws. See *Secure Communities*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, http://www.ice.gov/secure_communities (last visited August 3, 2014). As of January 22, 2013, ICE claimed the program was activated in 100 percent of jurisdictions. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, *ACTIVATED JURISDICTIONS* (2013), available at <http://www.ice.gov/doclib/secure-communities/pdf/sc-activated.pdf>.

ficer comes to pick him up and take him to an immigration detention center. There, he is told that the government will initiate proceedings to deport him.

Alex's marijuana conviction will now significantly impede his ability to fight his removal from the United States. Had he pled guilty to simple possession of marijuana, a typical charge for possessing a few marijuana cigarettes, he potentially could have avoided deportability under the deportation ground's personal use exception, which allows lawful permanent residents to avoid deportation if their only drug conviction is a "single offense involving possession for one's own use of 30 grams or less of marijuana."¹² Unfortunately, however, since the police found Alex in possession of marijuana while in the company of a friend, he was charged with the offense of sharing marijuana, which falls outside of the scope of the personal use exception and makes him deportable. His conviction also makes him ineligible for release from immigration detention on bond,¹³ meaning he will have to prepare to fight his case from an immigration detention center over the course of several months. Furthermore, Alex's conviction makes him ineligible for many types of relief from removal that would allow him to remain in the country with his family.¹⁴

If Alex is unable to overcome the many barriers he faces to contesting his deportation, he will be deported and face a minimum ten-year bar on immigrating to or visiting the United States.¹⁵ He may be subject to harsh conditions in his country of origin, including branding as a criminal deportee, detention by home country law enforcement,¹⁶ and even torture.¹⁷

12. See INA § 237(a)(2)(B)(i).

13. See INA § 236(c)(1), 8 U.S.C. § 1226(c)(1) (2012) (listing the criminal removability grounds that subject an individual to mandatory detention while their removal case is pending, including the controlled substance removability ground). *But see* *Rodriguez v. Robbins*, 715 F.3d 1127, 1143–44 (9th Cir. 2013) (holding that noncitizens subject to mandatory detention under INA § 236(c) have a right to a bond hearing after six months where the government must justify their continued detention on grounds that the noncitizen constitutes a flight risk or a danger to public safety).

14. See discussion of relief from removability *infra* Part II.

15. INA § 212(a)(9)(A)(ii) makes a noncitizen who has been previously removed from within the United States inadmissible. 8 U.S.C. § 1182(a)(9)(A)(ii) (2006). If Alex attempted to immigrate after the ten-year bar expired, he would still be inadmissible because of the marijuana offense on his record, as the controlled substance inadmissibility ground applies no matter how long ago the offense was committed. See Nancy Morawetz, *Rethinking Drug Inadmissibility*, 50 WM. & MARY L. REV. 163, 170 (2008) (noting that the controlled substance inadmissibility ground operates especially harshly in part because it applies "irrespective of the length of time since the offense").

16. See, e.g., *Bosede v. Mukasey*, 512 F.3d 946, 949 (7th Cir. 2007) (describing a Nigerian law known as Decree 33, which mandates imprisonment for "any Nigerian citizen found guilty in any foreign country of an offense involving narcotic drugs" (citing National Drug Law Enforcement Agency (Amendment) Decree No. 33 (1990) (Nigeria))); Jacob Kushner, *U.S. Deportees to Haiti, Jailed Without Cause, Face Severe Health Risks*, FLA. CTR. FOR INVESTIGATIVE REPORTING (Nov. 13, 2011), <http://fcir.org/2011/11/13/u-s-deportees-to-haiti-jailed-without-cause-face-severe-health-risks> (describing Haiti's policy of detaining

This hypothetical scenario provides an example of a situation that individuals throughout the United States face every day. The commission of a low-level marijuana offense, which often implicates very minimal criminal consequences, imposes incredibly harsh immigration consequences on noncitizen offenders.¹⁸ The way immigration and criminal law intersect in this context varies in several important aspects depending on the immigration status of the noncitizen criminal defendant,¹⁹ how the jurisdiction treats marijuana offenses,²⁰ at what level of offense the state appoints a public defender,²¹ and how closely the jurisdiction interacts with ICE.²² But the commonality across many juris-

deportees from the United States upon their arrival to Haiti and the gravity of the health and safety risks deportees face throughout their Haitian detention).

17. See, e.g., DANIEL KANSTROOM, *AFTERMATH: DEPORTATION LAW AND THE NEW AMERICAN DIASPORA* 16 (2012) (describing the “brutal mistreatment” of deportees to Haiti, including beating, burning, torture by electric shock, and the denial of medical treatment (citations omitted)).
18. I will use the term “noncitizen” to refer to a foreign-born individual who is not a United States citizen. Thus, this term covers individuals who are lawful permanent residents, asylees, temporary visa holders, visa overstays, and individuals who entered without inspection, among those with other statuses.
19. Had Alex been charged only with simple possession of marijuana, his arrest still could have triggered an ICE hold if he had a prior conviction for using marijuana or another controlled substance. As explained in note 12 *supra*, the personal use exception excuses lawful permanent residents from deportability with only one conviction for simple possession of marijuana, as long as the amount involved is less than 30 grams. *Supra* note 12 and accompanying text. But noncitizens present without authorized immigration status, or in temporary immigration statuses like student or worker visas, would likely be subject to deportability even after a first arrest for marijuana possession, since no such exception to deportability exists for legally present noncitizens who are not permanent residents.
20. Some jurisdictions still impose severe penalties on possession of small amounts of marijuana for personal use. See, e.g., OKLA. STAT. tit. 63, § 2-402(B) (2013) (making a second offense for possession of marijuana a felony punishable by up to ten years of incarceration); ARIZ. REV. STAT. ANN. § 13-3405(B)(1) (2013) (making possession of less than two pounds of marijuana a class six felony punishable by up to two years imprisonment). This is further discussed in Part I.
21. The Sixth Amendment guarantees the assistance of counsel to criminal defendants who are sentenced to actual imprisonment. *Scott v. Illinois*, 440 U.S. 367, 369 (1979) (holding that a criminal defendant’s Sixth Amendment right to counsel is not violated when the charged offense authorizes a sentence of imprisonment but one is not actually imposed); *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (holding that a criminal defendant cannot be sentenced to actual imprisonment unless provided with counsel). Therefore, in many states, defendants charged with certain misdemeanor offenses will not have the assistance of a public defender. See Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1340–43 (2012) (describing how criminal defendants throughout the country face misdemeanor charges without the assistance of counsel). This is discussed further in Part II.
22. Some jurisdictions have attempted to separate federal immigration enforcement efforts from local criminal proceedings. In 2011, the governors of Illinois, New York, and Massachusetts withdrew their states’ participation from ICE’s Secure Communities program. Kirk Semple & Julia Preston, *Deal to Share Fingerprints is Dropped, Not Program*, N.Y. TIMES, Aug. 6, 2011, http://www.nytimes.com/2011/08/06/us/06immig.html?_r=2&... The federal government responded to these

dictions is that a marijuana offense with very minimal criminal consequences subsequently implicates incredibly severe immigration consequences.

This Comment explores how this particular intersection of immigration and criminal law creates three disturbing phenomena for lawful permanent residents. First, marijuana laws are often enforced in a racially biased way.²³ While the criminal justice consequences of this racially biased enforcement have been widely noted, this trend also creates serious immigration problems for noncitizens, the majority of whom are people of color.

Second, as the penalties for marijuana offenses are lowered at the state and local level, indigent defendants are less likely to have the right to a public defender to represent them while facing these charges. Criminal defendants do not have a Sixth Amendment right to the assistance of counsel in cases where there is no possible sentence of actual imprisonment.²⁴ Thus, in jurisdictions that impose low penalties for nonserious marijuana offenses, defendants are more likely to face these charges without the assistance of an attorney, meaning that lawful permanent residents are often not advised by counsel of the likelihood that an admission of guilt will result in severe immigration consequences.²⁵ This lack of immigration advice may violate noncitizen defendants' Sixth Amendment right to affirmative and accurate advice regarding the immigration consequences of criminal charges.²⁶

Finally, lawful permanent residents who have committed marijuana offenses are often subject to harsh and unavoidable immigration consequences. Lawful permanent residents can be deported if they commit a marijuana offense that falls outside of the narrow personal use exception or if they have committed more than

and other efforts by terminating all Memorandums of Agreement that had been signed with jurisdictions throughout the country and announcing that compliance with the program was now mandatory. *Id.* Though controversy over the program's legality continues, Secure Communities' capabilities are set up everywhere in the country, though jurisdictions may choose to limit participation by not honoring detainer requests. *See* ACTIVATED JURISDICTIONS, *supra* note 11 and accompanying text.

23. *See* further discussion of racialized enforcement *infra* Part I.A.

24. *Scott*, 440 U.S. at 367.

25. In the Alex hypothetical, the jurisdiction treated marijuana offenses as misdemeanor crimes. In many other states, marijuana offenses have been classified as pseudocrimes that result only in a citation and imposition of a fine. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 11357(b) (West 2012) (making possession of not more than 28.5 grams of marijuana a civil infraction punishable by a fine of up to \$100). In these jurisdictions, it is even less likely that a noncitizen charged with a marijuana offense would speak with an attorney or know that they should take the charges seriously because of the severe immigration consequences attached to the charge. This phenomenon is discussed further in Part I.

26. *See* *Padilla v. Kentucky*, 559 U.S. 356 (2010).

one marijuana-related offense.²⁷ After deportation, these individuals remain presumptively ineligible for future immigration benefits because of the very same marijuana offense that made them initially deportable, meaning that it is highly unlikely that these individuals can ever return to the United States.²⁸ These unduly harsh and often unavoidable immigration consequences violate principles of proportionality and justice that should be guiding our nation's immigration policies. While immigration consequences have traditionally been insulated from searching judicial review under the plenary power doctrine, the severely disproportionate nature of the immigration consequences resulting from minor marijuana offenses provides a starting place for reevaluating this insulation.

This Comment explores these three issues in five Parts. Part I provides background regarding the racial history behind marijuana's initial criminalization and decades of racialized enforcement of marijuana laws. Recent efforts to partially decriminalize the personal use of small amounts of the drug are touted as a first step to diminishing these racial inequalities in drug enforcement, but these efforts leave noncitizens, who are often people of color, unprotected.

Part II explains how marijuana offenses interact with the deportability and inadmissibility provisions of the Immigration and Nationality Act, often making noncitizens deportable and severely limiting their options for relief from removal.

Part III explores the Supreme Court's 2010 *Padilla v. Kentucky*²⁹ decision, which holds that the Sixth Amendment right to effective assistance of counsel includes a right to advice on the potential immigration consequences of a guilty plea—when those consequences are “clear.”³⁰ Though the underlying crime in *Padilla* was a drug trafficking crime, which resulted in even harsher and more automatic immigration consequences than a low-level marijuana offense would, the language and reasoning of the case indicate that drug possession offenses trigger immigration consequences in a straightforward enough way to afford noncitizen defendants the same right to affirmative immigration advice from their defense attorneys.³¹

Part IV argues that the prevalence of lowered criminal penalties for marijuana use without an equivalent reduction of the corresponding immigration consequences violates principles of proportionality. Three recent Supreme Court

27. See INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i) (2006).

28. There is a waiver of inadmissibility available at section 212(h) of the Immigration and Nationality Act. INA § 212(h), 8 U.S.C. § 1182(h) (2006). But the waiver is only narrowly available and rarely granted. See *infra* note 141 and accompanying text.

29. 559 U.S. 356 (2010).

30. *Id.* at 374.

31. *Id.* at 368. This will be discussed further in Part III.

cases—*Padilla v. Kentucky*, *Carachuri-Rosendo v. Holder*,³² and *Moncrieffe v. Holder*³³—support this contention.

Finally, Part V briefly suggests four possible reforms within the criminal justice and immigration systems that could mitigate this problematic convergence of criminal and immigration law.

I. MARIJUANA CRIMINALIZATION AND DECRIMINALIZATION

A. The Racialized Origins of Marijuana Criminalization

The United States has not always considered marijuana to be an unlawful controlled substance. Historians trace marijuana's arrival in the United States to Mexican immigration to the Southwest in the early 1900s, and contemporaneous Caribbean and West Indian immigration to New Orleans.³⁴ Even as some cities moved early on to ban use of the substance, marijuana was commonly available in local drug stores and through mail-order businesses.³⁵ Physicians often prescribed marijuana for its therapeutic value, and the drug was a part of the United States' official list of medicinal drugs until 1942.³⁶

The first federal antimarijuana prohibition, the Marijuana Tax Act, was passed in 1937.³⁷ Many scholars explain the fervent efforts to criminalize marijuana in the 1930s by pointing to the association of the drug with poor Mexican and black workers.³⁸ As Bonnie and Whitebread note, "since [marihuana's] users—Mexicans, West Indians, blacks, and underworld whites—were associated in the public mind with crime, particularly of a violent nature, the association applied also to marihuana."³⁹ In fact, many of the arguments presented to justify

32. 130 S. Ct. 2577 (2010).

33. 133 S. Ct. 1678 (2013).

34. RICHARD J. BONNIE & CHARLES H. WHITEBREAD, II, *THE MARIHUANA CONVICTION: A HISTORY OF MARIHUANA PROHIBITION IN THE UNITED STATES* 32–33 (1974).

35. *Id.* at 33–34.

36. Gregg A. Bilz, *The Medical Use of Marijuana: The Politics of Medicine*, 13 *HAMLIN J. PUB. L. & POLY* 117, 117–18 (1992) (citing JEROME L. HIMMELSTEIN, *THE STRANGE CAREER OF MARIHUANA* 22 (1983)).

37. Marijuana Tax Act, Pub. L. No. 75-238, ch. 553, 50 Stat. 551 (1937) (repealed 1969). Local efforts to restrict marijuana use predated the federal law's passage by several years. BONNIE & WHITEBREAD, *supra* note 34, at 51 (noting that by 1933, thirty-three states had prohibited the use of marijuana for nonmedical purposes).

38. See, e.g., Sam Kamin, *The Challenges of Marijuana Law Reform*, in ASPATORE SPECIAL REPORT, *THE IMPACT OF THE DECRIMINALIZATION AND LEGALIZATION OF MARIJUANA* 5, 22 (Melanie Zimmerman ed., 2010). See generally BONNIE & WHITEBREAD, *supra* note 34 (exploring the history of marijuana criminalization, including the drug's association with people of color and the poor).

39. BONNIE & WHITEBREAD, *supra* note 34, at 52.

the drug's initial criminalization sounded in explicitly racial, and anti-Mexican, terms.⁴⁰ While considering the passage of a state law to criminalize marijuana, for example, a Texas state senator stated publically, “[a]ll Mexicans are crazy, and [marijuana] is what makes them crazy.”⁴¹ Discussions in the federal Ways and Means Committee marijuana hearings also focused on the use of marijuana by Mexican immigrants. During the hearings, Harry Anslinger, the Commissioner of the Federal Bureau of Narcotics, read aloud a letter from a Colorado newspaper editor referencing the violent effects he believed marijuana had on what he called the state’s “degenerate Spanish-speaking residents.”⁴²

In 1970, the Comprehensive Drug Prevention and Control Act (more commonly known as the Controlled Substances Act) officially criminalized marijuana.⁴³ Since its criminalization, marijuana arrests have played a significant part in the war on drugs and its subsequent impacts on people of color, immigrants, and the poor.⁴⁴ Ekow M. Yankah identifies the criminalization of marijuana as the prime example of the overcriminalization of American society, and points out the disproportionate race and class consequences of marijuana’s illegality. “The intersection of wealth, class, and law means that whereas many middle class can

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40. *See id.* But see CHERYL L. CHAMBERS, DRUG LAWS AND INSTITUTIONAL RACISM: THE STORY TOLD BY THE CONGRESSIONAL RECORD, 85-134 (2011) (concluding from a review of the Congressional record that the animus behind the Marihuana Tax Act was not racialized to the same extent as the opium laws of the late 1800s and the Anti-Drug Abuse Act of 1986 because the debate focused more on the ability of the federal government to levy a tax and the effect on hemp growers).
 41. PAUL BUTLER, LET’S GET FREE: A HIP-HOP THEORY OF JUSTICE 45 (2009) (internal quotation marks omitted).
 42. The letter sounded in even more explicit racism as it continued: “That’s why our problem [with marijuana] is so great; the greatest percentage of our population is composed of Spanish-speaking persons most of who [*sic*] are low mentally, because of social and racial conditions.” CHAMBERS, *supra* note 40, at 97 (citation omitted). Anslinger’s racial antagonism was not limited to Mexican immigrants, as he also claimed that marijuana encouraged the “Satanic music, jazz, . . . swing,” and interracial relationships of blacks, Latinos, and Filipinos. *See* DAVID E. NEWTON, MARIJUANA: A REFERENCE HANDBOOK 163 (2013) (quoting Harry Anslinger’s writings).
 43. Controlled Substances Act of 1970, Pub. L. No. 91-513, Title II, § 101, 84 Stat. 1242 (codified as amended at 21 U.S.C. §§ 801–971 (2006)). While marijuana use had been effectively unlawful since the 1937 passage of the Marihuana Tax Act, the Controlled Substances Act moved enforcement responsibilities from the Treasury Department to the Justice Department. Through establishment of the Drug Enforcement Administration (DEA).
 44. *See* HARRY G. LEVINE & DEBORAH PETERSON SMALL, MARIJUANA ARREST CRUSADE: RACIAL BIAS AND POLICE POLICY IN NEW YORK CITY 1997–2007, 4 (2008) (noting that the New York City Police Department arrested over 353,000 people for minor marijuana possession offenses from 1997 to 2006); Ryan S. King & Marc Mauer, *The War on Marijuana: The Transformation of the War on Drugs in the 1990s*, HARM REDUCTION J., Feb. 2006, at 1, 3, available at <http://www.harmreductionjournal.com/content/pdf/1477-7517-3-6.pdf> (finding that 82.4 percent of the national increase in drug arrests from 1990 to 2002 was due to marijuana-related offenses).

buy marijuana out of police view, many poor who engage in the same activity do so in public view, on street corners and the like, and are thus subject to stop, frisk, and arrest.”⁴⁵ In a recent interview, President Barack Obama confessed that he shares similar views, noting that “[m]iddle-class kids don’t get locked up for smoking pot, and poor kids do . . . African-American kids and Latino kids are more likely to be poor and less likely to have the resources and support to avoid unduly harsh penalties.”⁴⁶

Statistics support this conclusion. Nationally, blacks are almost four times more likely than whites to be arrested for marijuana possession, despite the fact that both groups use marijuana at similar rates.⁴⁷ This number likely underestimates the disparity, as the data used counts Latinos as white, and local studies show that Latinos are arrested for marijuana possession at much higher rates than non-Latino whites.⁴⁸ For example, a study of marijuana arrests in major California cities found that Latinos were arrested and prosecuted for marijuana use at rates double and triple that of whites, in spite of the fact that Latinos use marijuana at lower rates than whites.⁴⁹ While these racial disparities have existed for decades, the severity of the disparity has only increased in recent years.⁵⁰

This racially discriminatory arrest rate is particularly relevant to a discussion on the effects of marijuana’s legality or illegality on the immigrant community, since many immigrants of color⁵¹ are targeted by discriminatory law enforcement practices that may lead to marijuana arrests.⁵² The rise of government programs that automatically provide arrestee demographic information to ICE, like Secure Communities and the Criminal Alien Program, have made marijuana arrests a

45. Ekow N. Yankah, *A Paradox in Overcriminalization*, 14 N. CRIM. LAW REV. 1, 3 (2011).

46. David Remnick, *Going the Distance*, NEW YORKER, Jan. 27, 2014, at 52.

47. EDWARDS ET AL., *supra* note 3, at 17–21; *see also* Andrew Golub et al., *The Race/Ethnic Disparity in Misdemeanor Marijuana Arrests in New York City*, 6 CRIMINOLOGY & PUB. POLY 131, 144 (2007) (reporting disparate arrests of black and Latinos for marijuana possession as compared to whites in New York City from 1980 to 2003).

48. *Id.* at 132–33.

49. HARRY G. LEVINE ET AL., MARIJUANA ARREST RESEARCH PROJECT, ARRESTING LATINOS FOR MARIJUANA IN CALIFORNIA: POSSESSION ARRESTS IN 33 CITIES, 2006–08, 4–12 (2010), *available at* <http://marijuana-arrests.com/docs/Arresting-Latinos-For-Marijuana-California.pdf>.

50. *See id.* at 4 (noting that the marijuana arrest rate of Latino teenagers more than tripled between 1990 and 2008).

51. *See* ELIZABETH M. GRIECO ET AL., U.S. CENSUS BUREAU, THE FOREIGN-BORN POPULATION IN THE UNITED STATES: 2010, 2 (2012), *available at* <http://www.census.gov/prod/2012pubs/acs-19.pdf> (noting that 53 percent of the United States’ foreign born population is from Latin America and the Caribbean, 28 percent is from Asia, and 4 percent is from Africa).

52. *See generally* KEVIN R. JOHNSON, THE “HUDDLED MASSES” MYTH: IMMIGRATION AND CIVIL RIGHTS 121–22 (2004) (arguing that racially skewed law enforcement efforts disproportionately effect immigrant communities); Golub et al., *supra* note 47, at 144.

significant entry point to the deportation system.⁵³ In fact, marijuana possession is both the most common underlying charge in drug-related deportations, outpacing even deportations for drug trafficking offenses, and the fourth most common offense leading to deportation overall.⁵⁴ Put differently, every year, thousands of individuals are deported from this country with no more serious offense on their record than marijuana possession.

And, reminiscent of decades-old discussions on marijuana's dangers, politicians and the media continue to characterize immigrants, and Latino immigrants in particular, as dangerous drug users and traffickers. Discussions on comprehensive immigration reform have referenced "hundred[s]" of immigrant children with "calves the size of cantaloupes [from] hauling 75 pounds of marijuana across the desert."⁵⁵ This is further evidence that marijuana criminalization remains deeply tied to issues of racism and xenophobia, with devastating consequences for immigrant communities.

B. Decriminalization

In recent years, however, more and more states and localities have begun to decriminalize or legalize the possession of small amounts of marijuana, either for medicinal⁵⁶ or recreational use.⁵⁷ For the purposes of this Comment, I divide into

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53. See generally *The Criminal Alien Program (CAP): Immigration Enforcement in Prisons and Jails*, AM. IMMIGRATION COUNCIL (Aug. 2013), http://www.immigrationpolicy.org/sites/default/files/docs/cap_fact_sheet_8-1_fin_0.pdf; *Secure Communities*, NAT'L IMMIGRATION FORUM (2013), http://www.immigrationforum.org/images/uploads/secure_communities.pdf.
 54. TRAC Immigration, *Secure Communities and ICE Deportation: A Failed Program?*, TRAC IMMIGRATION (Apr. 8, 2014), <http://trac.syr.edu/immigration/reports/349/#f3> (showing 6,447 and 6,770 deportations for marijuana possession in Fiscal Years 2012 and 2013, compared to 1,730 and 2,193 deportations for drug trafficking offenses in those same years). These numbers are an undercount, as they only reflect deportations by ICE and not those administered by Customs and Border Patrol (CBP), the agency responsible for most deportations at the border. *Id.*
 55. Juliet Lapidus, *Steve King Still Stands by 'Cantaloupe' Comments*, N.Y. TIMES, Aug. 12, 2013, http://takingnote.blogs.nytimes.com/2013/08/12/steve-king-still-stands-by-cantaloupe-comments/?_php=true&_type=blogs&c_r=0.
 56. Thirty-two states and the District of Columbia have attempted to protect medical marijuana users from criminal penalties in some form or another, though the Marijuana Policy Project estimates that these laws are effective in only twenty-one states and the District of Columbia. MARIJUANA POLICY PROJECT, STATE-BY-STATE MEDICAL MARIJUANA LAWS: HOW TO REMOVE THE THREAT OF ARREST 1 (2013), available at <http://www.mpp.org/assets/pdfs/library/State-by-State-Laws-Report-2013.pdf>; see also Claire Frezza, *Medical Marijuana: A Drug Without a Medical Model*, 101 GEO. L.J. 1117, 1118 (2013) (citations omitted) (listing statutes legalizing the use of medical marijuana in eighteen states). I will not address the legalization of marijuana for medical use in this Comment. Though local legalization of medical marijuana is an important sign of changing social attitudes toward the use of marijuana, medical marijuana users should not in theory be subject to criminal penalties for their use, and thus their immigration statuses should not be affected.

two categories state and local efforts to minimize or eliminate the criminal consequences of using small amounts of marijuana. In states and localities where marijuana use has been legalized, the recreational use of small amounts of marijuana is officially sanctioned and regulated.⁵⁸ Other states and localities have chosen not to decriminalize marijuana, but have lowered penalties for marijuana use so that offenders are only subject to minimal fines or jail time.⁵⁹ I call this phenomenon pseudo-decriminalization.⁶⁰ These two approaches each have a different impact on noncitizens caught using marijuana, but pseudo-decriminalization is the far more dangerous of the two.

1. Legalization Efforts

The most sweeping efforts to legalize marijuana in recent years have come out of the American West. In 2012, Colorado and Washington State legalized the recreational use of marijuana.⁶¹ In Colorado, 54 percent of voters supported

57. Of course, in many states, marijuana possession remains subject to harsh penalties. *See supra* note 20. Though the harsh treatment of marijuana offenses in these states is problematic within the realm of criminal justice, noncitizen defendants charged in these states may have better protections regarding the immigration consequences of these offenses because they are more likely to have access to a public defender to advise them of the potentially harsh immigration consequences that will likely result from a conviction.

58. *See, e.g.*, Jack Healy, *Voters Ease Marijuana Laws in Two States, but Legal Questions Remain*, N.Y. TIMES, Nov. 7, 2012, <http://www.nytimes.com/2012/11/08/us/politics/marijuana-laws-eased-in-colorado-and-washington.html>.

59. *See infra* notes 79-87 and accompanying text. As a backdrop to these state and local efforts, marijuana possession and use remains definitively unlawful in the eyes of the federal government. *See Gonzales v. Raich*, 545 U.S. 1, 33 (2005) (upholding the application of the Controlled Substances Act to marijuana in response to a challenge brought by California residents who used marijuana under the state's Compassionate Use Act). *Cf.* Robert A. Mikos, *On the Limits of Federal Supremacy: When States Relax (or Abandon) Marijuana Bans*, 714 POL'Y ANALYSIS 1 (2012) (affirming that anticommmandeering prevents the federal government from prohibiting states from legalizing activities that are illegal under federal law, using state medical marijuana legalization efforts as an example).

60. I was unable to find any widely adopted term that is used to characterize the phenomenon of lowering penalties for marijuana use without fully legalizing its use. Some bloggers have used the term pseudodecriminalization to describe these measures, but I did not find any scholarly use of the term. *See, e.g.*, Scott Nath, *Philadelphia Saves \$2 Million by Creating Pseudo-Decriminalization of Marijuana*, PROHIBITION'S END (July 18, 2011), <http://prohibitionend.com/2011/07/18/philadelphia-saves-2million-by-creating-pseudo-decriminalization-of-marijuana>. The legalization of medical marijuana has also been referred to as pseudolegalization by some commentators. *See, e.g.*, Andrew Sullivan, *Pseudo Legalization*, ATLANTIC (Oct. 4, 2010, 6:17 AM), <http://www.theatlantic.com/daily-dish/archive/2010/10/pseudo-legalization/181661>.

61. Healy, *supra* note 58.

Amendment 64,⁶² which amended the Colorado Constitution to allow the recreational use of small amounts of marijuana for adults 21 and older.⁶³ In Washington, 56 percent of voters supported Initiative 502,⁶⁴ which allows adults to use small amounts of marijuana recreationally as regulated by the state's liquor control board. In both states, adults who possess less than one ounce of marijuana for their personal, private use are not subject to any regulatory or criminal penalties.⁶⁵ Legal sales of recreational marijuana began January 1, 2014 in Colorado, and stores opened Washington in the summer of 2014.⁶⁶

Oregon and Alaska followed suit in November 2014, with 55 and 52 percent of voters, respectively, approving legalization bills modeled after the efforts of Colorado and Washington State.⁶⁷ Washington D.C. also became the first East Coast outpost to experiment with legalization, with an overwhelming 69 percent of voters supporting an initiative that would allow adults to possess up to two ounces of marijuana and to cultivate as many as three marijuana plants at

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62. Matt Sledge, *Colorado, Washington Pot Legalization Deals Drug War Major Blow*, HUFFINGTON POST (Nov. 7, 2012, 1:33 AM), http://www.huffingtonpost.com/2012/11/07/colorado-washington-pot-legalization-_n_2086023.html.
63. COLO. CONST. art. 18, § 16(1)(a) ("In the interest of the efficient use of law enforcement resources, enhancing revenue for public purposes, and individual freedom, the people of the state of Colorado find and declare that the use of marijuana should be legal for persons twenty-one years of age or older and taxed in a manner similar to alcohol.").
64. Sledge, *supra* note 62.
65. While private possession of up to one ounce of marijuana is legalized, possession of more than one ounce will still be subject to criminal penalties in the state of Washington. WASHINGTON STATE LIQUOR CONTROL BOARD, *Fact Sheet: Initiative 502's Impact on the Washington State Liquor Control Board* (Nov. 7, 2012), available at <http://www.liq.wa.gov/publications/Marijuana/I-502/Fact-Sheet-I502-11-7-12.pdf>. The Colorado measure specifies that marijuana use will only be legal if conducted in private. COLO. CONST. art. 18, § 16(3)(d) ("nothing in this section shall permit consumption that is conducted openly and publicly or in a manner that endangers others.").
66. See Matt Ferner, *Washington State Is Low on Legal Weed For Marijuana Debut*, HUFFINGTON POST (July 3, 2014, 12:59 PM), http://www.huffingtonpost.com/2014/07/03/washington-marijuana-supply_n_5552962.html; Jack Healy, *Up Early and in Line for a Marijuana Milestone in Colorado*, N.Y. TIMES, Jan. 1, 2014, <http://www.nytimes.com/2014/01/02/us/colorado-stores-throw-open-their-doors-to-pot-buyers.html>.
67. Josh Barro, *D.C., Oregon and Alaska Vote to Legalize Marijuana*, N.Y. TIMES, Nov. 3, 2014, <http://www.nytimes.com/2014/11/04/upshot/marijuana-on-the-ballot-in-florida-alaska-oregon-and-dc.html>.

home.⁶⁸ Legalization advocates are preparing to put similar measures on 2016 ballots in Arizona, California, Maine, Massachusetts, and Nevada.⁶⁹

While the Obama administration initially considered taking legal action against the states,⁷⁰ the federal government now seems prepared to cautiously tolerate these state legalization efforts. The Treasury Department has given the green light to banks wishing to fund marijuana dispensaries,⁷¹ and President Obama has expressed his moderate approval of the states' legalization efforts.⁷² The D.C. measure, however, may prove to be the ultimate test of the federal government's tolerance for this experimentation. Since the district is subject to federal oversight, the U.S. Congress could overturn the measure or block it from going forward, as House Republicans have already threatened to do.⁷³

These legalization measures provide some protections for noncitizens who would otherwise be put at risk of deportability. As will be explained in further detail in Part III, a noncitizen cannot be deported for using marijuana without first being convicted of doing so.⁷⁴ The controlled substance deportability ground is triggered only when a noncitizen "has been convicted of a violation of (or a con-

68. *Id.*; Aaron C. Davis, *D.C. Voters Overwhelmingly Support Legalizing Marijuana, Joining Colorado*, *Washington Post*, Nov. 4, 2014, http://www.washingtonpost.com/local/dc-politics/dc-voters-titling-heavily-toward-legalizing-marijuana-likely-joining-colo-wash/2014/11/04/116e83f8-60fe-11e4-9f3a-7e28799e0549_story.html. The D.C. measure differs from the states' legalization efforts, as personal growth and use are permitted but sales are not.

69. Niraj Chokshi, *What's Next for the Marijuana Movement*, *Washington Post*, Nov. 6, 2014, <http://www.washingtonpost.com/blogs/govbeat/wp/2014/11/06/whats-next-for-the-marijuana-movement/>.

70. Charlie Savage, *Administration Weighs Legal Action Against States That Legalized Marijuana Use*, *N.Y. Times*, Dec. 6, 2012, <http://www.nytimes.com/2012/12/07/us/marijuana-initiatives-in-2-states-set-federal-officials-scrambling.html>.

71. Memorandum from James M. Cole, Deputy Attorney General, to All United States Attorneys, *Guidance Regarding Marijuana Related Financial Crimes* (Feb. 14, 2014), *available at* <http://thecannabisindustry.org/uploads/DAG-Memo-Guidance-Regarding-Marijuana-Related-Financial-Crimes-2-14-14.pdf>.

72. David Remnick, *Going the Distance*, *NEW YORKER*, Jan. 27, 2014 (quoting President Obama as saying, in regards to the recent state legalizations, that "it's important for it to go forward because it's important for society not to have a situation in which a large portion of people have at one time or another broken the law and only a select few get punished.").

73. Aaron C. Davis, *Legalization Limbo in D.C.: Republican Congress Will Have Final Say on City Pot Law*, *Washington Post*, Nov. 5, 2014, http://www.washingtonpost.com/local/dc-politics/house-republican-vows-to-upend-dc-ballot-measure-legalizing-marijuana/2014/11/05/10304f2c-6508-11e4-9fdc-d43b053ecb4d_story.html.

74. The controlled substance deportability ground requires a conviction. INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i) (2012). One possible way around the conviction requirement is to rely on the drug abuse deportability ground, which makes drug abusers and addicts deportable without any conviction. INA § 237(a)(2)(B)(ii), 8 U.S.C. § 1227(a)(2)(B)(ii) (2012). This deportability ground has rarely been relied on in recent years, however, as most supposed drug abusers have controlled substance convictions, which are much easier to prove as a ground of deportation.

spiracy or attempt to violate) any law . . . relating to a controlled substance.”⁷⁵ Therefore, in states where use of small amounts of marijuana has been affirmatively legalized, noncitizens are more likely to avoid deportation for smoking marijuana.⁷⁶

These legalizations, however, would not protect noncitizens charged with marijuana offenses by the federal government. For example, individuals can be ticketed for using marijuana in federal parks, an offense that could make a noncitizen deportable.⁷⁷ Additionally, individuals who take marijuana purchased in Colorado or Washington across state lines may be prosecuted in a neighboring state for possession of the drug.⁷⁸

The parallel experimental legalizations and ongoing criminalization of marijuana highlights the dramatic privilege disparities between different groups of marijuana users. The rich, U.S. citizens, and members of the (mostly white) upper class can embrace and profit from marijuana’s new mainstream acceptance: Marijuana themed weddings, lifestyle blogs, and high-end dispensaries are a fast-growing industry.⁷⁹ The Denver Post now employs its own “pot critic,” providing

75. INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i) (2012).

76. While this Comment will focus primarily on deportability, it is worth noting that noncitizens are likely protected from marijuana-related inadmissibility in these jurisdictions as well. The controlled substance inadmissibility ground is implicated when a noncitizen has been “convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of . . . a violation of . . . any law or regulation . . . relating to a controlled substance.” INA § 212(a)(2)(A)(i), 8 U.S.C. § 1182(a)(2)(A)(i) (2012). If the use of small amounts of marijuana is no longer violating a law or regulation in the jurisdiction where the individual uses marijuana, presumably the inadmissibility ground is not triggered. To be found inadmissible based on admission of criminal conduct, the conduct must clearly be a crime under the law governing where the act occurred. See *Matter of M-, 1 I. & N. Dec. 229* (B.I.A. May 8, 1942). Of course, marijuana use remains illegal under federal law, and thus an individual using marijuana in a way permitted by the state or locality is technically still violating federal law. But experts in the field of immigration and criminal law do not believe that marijuana use in localities where it is permitted would trigger this inadmissibility ground. *E.g.* Telephone Interview with Josh Epstein, Esq., Immigrant Defense Project (Dec. 11, 2012). Additionally, this ground could only be triggered if the intending immigrant affirmatively admits use. *But see Pazcoguin v. Radcliffe*, 292 F.3d 1209 (9th Cir. 2002) (allowing admission of marijuana use to a psychiatrist to create inadmissibility on controlled substance grounds).

77. See 36 C.F.R. § 2.35 (2012) (prohibiting the possession of a controlled substance in federal parks).

78. See Jenny Deam, *Colorado’s Neighbors Dismayed By New Wave of Marijuana Traffic*, L.A. TIMES, May 27, 2014, <http://www.latimes.com/nation/la-na-pot-trafficking-20140527-story.html#page=1> (noting that marijuana arrests have increased in many states bordering Colorado).

79. See, e.g., Lois Smith Brady, *A Toast? How About a Toke? Marijuana is a Welcome Wedding Guest in Colorado and Washington State*, N.Y. TIMES, July 25, 2014, www.nytimes.com/2014/07/27/fashion/marijuana-wedding-guest-colorado-and-washington-state.html?_r=0 (describing the fast-growing phenomenon of pot-themed weddings); Drew Sandholm, *Entrepreneur Promotes Pot to the Super Wealthy*, CNBC, Sept. 8, 2014, www.cnbc.com/id/101981012# (describing efforts of the

regular reviews of different product and strains of marijuana.⁸⁰ Entrepreneurs are fast entering the growing economy of legalization, hoping to “weed[] out the stoners” and “show the world that normal, professional, successful people consume cannabis.”⁸¹

The gap between the consequences of marijuana use for these “normal, professional, successful” users and immigrants is vast and unjust. Scholar Michelle Alexander has spoken about the starkness of this contrast in the context of mass incarceration. Commenting on the growth of the marijuana market in Colorado, she noted “after 40 years of impoverished black men getting prison time for selling weed, white men are planning to get rich doing precisely the same things.”⁸² Her comments ring just as true in the immigration context: While the privileged gain wealth from marijuana’s new mainstream acceptance, United States immigration laws still harshly punish any noncitizen who has used marijuana at any point in his or her lifetime.

The risks for immigrant users are greatest not at a Colorado marijuana wedding, however, but in areas where marijuana use has been largely decriminalized but not legalized.

2. Pseudo-decriminalization Efforts

Outside of Washington and Colorado, states and localities throughout the country are pseudo-decriminalizing marijuana by lowering the consequences of possessing small amounts of marijuana for personal use without making personal use affirmatively legal. This pseudo-decriminalization can take various forms: lowering the criminal penalties prescribed by statute, requiring law enforcement to issue summons instead of arresting individuals found with small amounts of marijuana, or directing that marijuana possession be the lowest priority for law enforcement.

self-proclaimed “Martha Stewart of marijuana,” who founded a cannabis club in Beverly Hills in an attempt to “rebrand the face of the modern cannabis culture.”)

80. Jessica Bennet, *The Life of a Pot Critic: Clean, With Citrus Notes*, N.Y. TIMES, Nov. 7, 2014, <http://www.nytimes.com/2014/11/09/fashion/the-life-of-a-pot-critic-denver-post-clean-with-citrus-notes.html>.

81. Jessica Bennett, *In Colorado, a Rebranding of Pot Inc.*, N.Y. TIMES, Oct. 3, 2014, www.nytimes.com/2014/10/05/fashion/in-colorado-a-rebranding-of-pot-inc-marijuana.html (quoting the founder of an advertising agency that markets marijuana products).

82. Saki Knafo, *White Men Getting Rich From Legal Weed Won't Help Those Harmed Most By Drug War*, HUFFINGTON POST (March 6, 2014, 5:06 PM), www.huffingtonpost.com/2014/03/06/michelle-alexander-drug-war_n_4913901.html (quoting Michelle Alexander).

At least fourteen states and the District of Columbia have changed their drug laws to make first time simple possession of marijuana a civil infraction.⁸³ This generally means that offenders should receive a citation in lieu of arrest and will have no criminal record after the incident's resolution.⁸⁴ In California, possession of 28.5 grams or less of marijuana is an infraction punishable only by a fine of one hundred dollars or less.⁸⁵ A similar Massachusetts statute specifies that possession of one ounce or less of marijuana is punishable only by a fine of one hundred dollars and forfeiture of the drug.⁸⁶ The statute specifies that no "other form of criminal or civil punishment or disqualification" shall be imposed on the offender.⁸⁷ In Minnesota, possession of 42.5 grams or less of marijuana is a petty

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83. In Alaska, possession of up to 4 ounces of marijuana is technically punishable by up to ninety days imprisonment. ALASKA STAT. § 11.71.050 (2014). The Alaska Supreme Court has held that possession of up to 4 ounces of marijuana in one's home, however, is protected by the privacy clause of the Alaska Constitution, and thus cannot be prosecuted. *Ravin v. State*, 537 P.2d 494 (Alaska 1975); see also *Noy v. State*, 83 P.3d 545 (Alaska Ct. App. 2003). Other states have restricted penalties by statute. See CAL. HEALTH & SAFETY CODE § 11357(b) (2014) (making possession of less than 28.5 grams of marijuana an infraction punishable by up to a \$100 fine); COLO. REV. STAT. § 18-18-406(5)(b)(1) (2014) (making public consumption of 2 ounces or less of marijuana punishable by up to a \$100 fine and twenty-four hours of community service); CONN. GEN. STAT. § 21a-279 (2014) (punishing first-time possession of less than one-half ounce of marijuana with a \$150 fine); DIST. COLUM. CODE. § 48-1201 (2014) (making possession or transfer of less than one ounce of marijuana a civil violation); ME. REV. STAT. ANN. tit. 22 § 2383(1)(A) (West Supp. 2013) (making possession of a "usable amount of marijuana" a civil violation punishable by up to a \$600 fine); MD. CODE § 5-601.1 (2014) (punishing first- and second-time possession of less than ten grams of marijuana by citation and a \$100 or \$250 fine); MASS. GEN. LAWS ANN. ch. 94C § 32L (LexisNexis Supp. 2013) (making possession of less than one ounce of marijuana a civil offense punishable by \$100 fine); MINN. STAT. § 152.027 (2014) (making possession of less than 42.5 grams of marijuana a misdemeanor punishable by drug treatment and a maximum \$200 fine); MISS. CODE ANN. § 41-29-101 et. seq. (2013) (making first-time possession of less than 30 grams of marijuana punishable by maximum \$250 fine); NEB. REV. STAT. § 28-416 (2014) (making first-time possession of less than one ounce of marijuana an infraction punishable by drug treatment and a maximum \$300 fine); NEV. REV. STAT. § 453.336 (2014) (making first-time possession of less than one ounce of marijuana a misdemeanor punishable by a fine of no more than \$600); N.Y. PENAL LAW § 221.05 (2014) (making first and second marijuana possession offenses of up to 25 grams punishable by fines of \$100 and \$200, respectively); OR. REV. STAT. § 475.864 (2014) (making possession of less than one ounce of marijuana punishable by fine of \$650); R.I. GEN. LAWS § 21-28-4.01(c)(1)(2)(iii) (West Supp. 2013) (making the possession of up to one ounce of marijuana a civil offense punishable by a \$150 fine and forfeiture of the marijuana); 18 VERM. STATUTES ANN. 4230(a) (2014) (providing for civil penalties only for possessing less than one ounce of marijuana).
84. See *supra* note 83; see also Eric Blumenson & Eva Nilson, *No Rational Basis: The Pragmatic Case for Marijuana Reform*, 17 VA. J. SOC. POL'Y & L. 43, 74 (2009) (noting that, in the absence of full decriminalization, many states have opted to reduce criminal penalties so that first-time offenders can avoid a criminal record).
85. CAL. HEALTH & SAFETY CODE § 11357(b) (West 2012).
86. MASS. GEN. LAWS ANN. ch. 94C, § 32L (West 2012).
87. *Id.* ("Notwithstanding any general or special law to the contrary, possession of one ounce or less of marihuana shall only be a civil offense, subjecting an offender who is eighteen years of age or older

misdeemeanor, punishable by participation in drug treatment and no more than a 300 dollar fine.⁸⁸ And similarly, Nebraska punishes a first offense for possession of one ounce of less of marijuana as an infraction, imposing only a citation, a 300 dollar fine, and the option of drug treatment.⁸⁹ States with similar provisions include Alaska, Connecticut, Maine, Mississippi, Nevada, New York, Oregon, Rhode Island, Vermont, and, most recently, Maryland.⁹⁰ Many cities, including Berkeley, California; Ann Arbor, Michigan; Fayetteville, Arkansas; and Chicago, Illinois, have passed local ordinances directing law enforcement officers not to target marijuana users.⁹¹

Proponents of these pseudo-decriminalization efforts often offer explicit financial justifications for these lowered penalties. In 2010, then-governor of California Arnold Schwarzenegger signed Senate Bill 1449, which reduced penalties for possession of less than 28.5 grams of marijuana. Though Schwarzenegger openly opposed a contemporaneous ballot measure that would have legalized the use of marijuana by adults in the state,⁹² he signed Senate Bill 1449 because of the help it would provide the state budget, explaining that reducing marijuana pos-

to a civil penalty of one hundred dollars and forfeiture of the marihuana, but not to any other form of criminal or civil punishment or disqualification.”).

88. MINN. STAT. ANN. § 152.01(16) (West 2011) (defining “small amount” of marijuana as 42.5 grams or less when applied to marijuana offenses); MINN. STAT. ANN. § 152.027 (West 2011) (unlawful possession of a small amount of marijuana is a petty misdemeanor). Under Minnesota law, individuals charged with petty misdemeanors are not qualified for court-appointed counsel unless charged with a crime involving moral turpitude. 49 MINN. R. CRIM. P. 23.05(2). Drug possession crimes are generally not considered to be crimes involving moral turpitude. *See, e.g., Hampton v. Wong Ging*, 299 F. 289, 289 (9th Cir. 1924) (holding that drug possession does not demonstrate sufficiently “aggravated character” to constitute a crime involving moral turpitude); *see also* U.S. Dep’t of State, 9 FOREIGN AFFAIRS MANUAL 40.21(a) N2.3-4 (2014) (noting that “[t]he mere possession or use of a controlled substance is not a crime involving moral turpitude”). Drug trafficking crimes, however, are considered to be crimes involving moral turpitude. *See, e.g., Barragan-Lopez v. Mukasey*, 508 F.3d 899, 905 (9th Cir. 2007).

89. NEB. REV. STAT. § 28-416(13)(a) (2008).

90. *See supra* note 83.

91. *See* FAYETTEVILLE, ARK., CODE OF ORDINANCES art. II, § 130.02 (2014); BERKELEY, CAL., MUN. CODE § 12.24.030 (2012) (“The City Council shall seek to ensure that the Berkeley Police Department gives lowest priority to the enforcement of marijuana laws.”); *id.* § 12.24.040 (“The City Council shall seek to ensure that the Berkeley Police Department makes no arrests and issues no citations for violations of marijuana laws.”); ANN ARBOR, MICH., CITY CHARTER § 16.2 (2004) (specifying that marijuana possession is punishable by a twenty-five dollar fine for the first offenses, and prohibiting city police officers from reporting marijuana offenses to anyone besides the city attorney); Don Babwin, *Chicago Marijuana Ticketing Approved by City Council, Decriminalizes Low-Level Offenses*, HUFFINGTON POST (June 27, 2012, 6:35 PM), http://www.huffingtonpost.com/2012/06/27/chicago-marijuana-ticketing_n_1631783.html.

92. Arnold Schwarzenegger, *SEIU Is Off-Base on Legalizing Pot*, L.A. TIMES, Sept. 24, 2010, <http://articles.latimes.com/2010/sep/24/opinion/la-oe-schwarzenegger-marijuana-pensio20100924> (criticizing the labor union SEIU for its support of Proposition 19, which would have legalized the growing and possession of marijuana in California).

session from a misdemeanor to a violation eliminated a defendant's right to a jury trial and stating: "In this time of drastic budget cuts, [we] cannot afford to expend limited resources prosecuting a crime that carries the same punishment as a traffic ticket."⁹³ The Fayetteville, Arkansas ordinance also explicitly identifies the costs of marijuana enforcement on the city and state as one of the reasons for its passage, noting that "law enforcement resources would be better spent fighting serious and violent crimes" instead of enforcing marijuana offenses by adults.⁹⁴ Legal scholars have also proposed that states lower penalties for nonserious misdemeanors as a way to eliminate the right to counsel and divert more resources to felony and serious misdemeanor representation.⁹⁵

While these efforts may very well help law enforcement prioritize crime-reduction efforts and ease the strain on city and state budgets, these types of pseudo-decriminalization policies pose a great risk to noncitizens who use marijuana. Because the use of marijuana still risks at least some measure of punishment, noncitizens charged with low-level marijuana offenses will likely end up with a criminal record that constitutes a conviction for immigration purposes. In immigration law, almost any formal judgment or admission of guilt is considered a conviction that can trigger corresponding grounds of deportability and inadmissibility.⁹⁶ Thus, even if marijuana use is punished with something like a fine, probation, or drug treatment, the resolution will often be considered a conviction under immigration law.⁹⁷ But because of the noncriminal nature of these possible penalties, a noncitizen may be less likely to take a marijuana charge seriously or even bother to contest it.⁹⁸

93. Jesse McKinley, *California Reduces Its Penalty for Marijuana*, N.Y. TIMES, Oct. 1, 2010, <http://www.nytimes.com/2010/10/02/us/politics/02pot.html>.

94. FAYETTEVILLE, ARK. CODE OF ORDINANCES art. II, § 130.02(5) ("Each year, Arkansas spends more than \$30 million of taxpayer money enforcing marijuana laws."); *id.* § 130.02(6) ("Law Enforcement resources would be better spent fighting serious and violent crimes."); *id.* § 130.02(7) ("Making adult marijuana offenses Fayetteville's lowest law enforcement priority will reduce the City's spending on law enforcement and punishment.").

95. *See, e.g.*, Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461 (2007).

96. INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A) (2006). Proceedings that do not require a finding of guilt beyond a reasonable doubt may not be considered criminal convictions for immigration purposes. *Eslamizar*, 23 I. & N. Dec. 684, 689 (B.I.A. 2004). This issue is further explored in Part II.

97. *See, e.g.*, Nina Bernstein, *How One Marijuana Cigarette May Lead to Deportation*, N.Y. TIMES, Mar. 30, 2010, <http://www.nytimes.com/2010/03/31/nyregion/31drug.html?pagewanted=all> (telling the story of Jerry Lemaine, a lawful permanent resident (LPR) who was put in deportation proceedings after paying a \$100 fine for possession of one marijuana cigarette).

98. *See Morawetz, supra* note 15, at 192 ("Ironically, more lenient [marijuana enforcement] policies used in some jurisdictions may also contribute to making noncitizens inadmissible. In a jurisdiction

Importantly, as will be discussed further in Part III, these are the jurisdictions where it is most likely that noncitizens will not have the assistance of an attorney to warn them of the serious immigration consequences that accompany marijuana offenses.⁹⁹ For example, Massachusetts, where possession of less than one ounce of marijuana is a civil infraction,¹⁰⁰ does not require the appointment of counsel for defendants facing misdemeanor or municipal ordinance violation charges unless a sentence of incarceration is possible.¹⁰¹ This combination of lowered penalties for marijuana use and the denial of counsel because of the low criminal penalties occurs in several other states as well.¹⁰²

It is unusual to see such broad state efforts toward decriminalization in an era otherwise characterized by overcriminalization of drug offenses.¹⁰³ Yet these widespread state efforts, combined with polls showing that the majority of Americans now support marijuana legalization,¹⁰⁴ may indicate that legalization is somewhat inevitable in the long term. Remarkably, the *New York Times* editorial board has recently called for the federal government to “repeal Prohibition, again” and legalize marijuana.¹⁰⁵ Until legalization becomes feasible, however, many respected policy and legal organizations have proposed pseudo-decriminalization as a step along the way.¹⁰⁶ What most of these proposals fail to acknowledge, or

that treats a possession offense as something very minor, . . . a person may not take the violation very seriously or bother to contest an erroneous citation.”) (citation omitted).

99. See Part III for further discussion of how the absence of counsel in these circumstances may violate noncitizens’ Sixth Amendment right to counsel under the important Supreme Court decision *Padilla v. Kentucky*.
100. MASS. GEN. LAWS ANN. ch. 94C, § 32L (LexisNexis Supp. 2013).
101. MASS. GEN. LAWS ANN. ch. 211D, §2B (LexisNexis Supp. 2014).
102. See, e.g., OHIO REV. CODE ANN. § 2925.11 (West 2006) (making possession of less than 100 grams of marijuana a minor misdemeanor punishable by a maximum fine of \$150); OHIO R. CRIM. P. 44(B) (West 2011) (specifying that defendants charged with petty offenses need not be appointed counsel if no jail time is imposed); see also ME. REV. STAT. tit. 22, § 2383(1)(A) (West Supp. 2013) (making possession of usable amounts of marijuana a civil infraction punishable by a fine of up to \$600); ME. R. CRIM. P. 44(a)(1) (West 2013) (allowing the court to deny defendants charged with misdemeanor offenses a public defender if no possible prison time could result from their cases).
103. Yankah, *supra* note 45, at 8.
104. Scott Clement, *Legalize It, Poll Shows*, WASH. POST, Apr. 4, 2013, <http://www.washingtonpost.com/blogs/the-fix/wp/2013/04/04/legalize-it-poll-shows> (showing that 52 percent of Americans now support marijuana legalization).
105. Editorial Board, *Repeal Prohibition, Again*, N.Y. TIMES, July 26, 2014, http://www.nytimes.com/interactive/2014/07/27/opinion/sunday/high-time-marijuana-legalization.html?_r=0.
106. See, e.g., EDWARDS ET AL., *supra* note 3, at 13 (proposing on behalf of the American Civil Liberties Union, that “[i]f depenalization is unobtainable, states should decriminalize marijuana possession for personal use by reclassifying all related criminal laws as civil offenses”); Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74 (forthcoming 2015) (proposing a cooperative federalism approach that would allow states to experiment with new regulatory approaches).

acknowledge only briefly and brush aside, are the incredibly harsh immigration consequences that will remain if states classify marijuana possession as a civil offense.¹⁰⁷ As long as marijuana remains illegal from the perspective of the federal government,¹⁰⁸ any decriminalization measures that fall short of affirmative legalization will continue to pose grave harms for noncitizens, who remain subject to immigration law's harsh treatment of marijuana offenses.

II. THE IMMIGRATION CONSEQUENCES OF MARIJUANA USE

This Part explains how our nation's immigration laws mandate harsh consequences for lawful permanent residents convicted of low-level marijuana offenses. While the personal use exception creates a limited protection from deportability, its scope is so narrow that many lawful permanent residents with nonserious marijuana convictions fall outside of its protection. Additionally, marijuana convictions can prevent noncitizens from obtaining certain forms of relief from deportation and from returning to the United States in the future if they are deported. These harsh consequences often result in severe hardship to immigrant families and communities, and are inconsistent with society's growing recognition that marijuana use is generally nonserious.

A. Marijuana Offenses Often Make Noncitizens Deportable

Under current immigration laws, low-level marijuana offenses, like simple possession, most often implicate the Immigration and Nationality Act's (INA's) controlled substance deportability ground. INA section 237(a)(2)(B)(i) makes a noncitizen who "at any time after admission has been convicted of a violation of . . .

107. For example, the *New York Times* briefly mentions effect on immigration status as one of the many "lifelong consequences" of a marijuana conviction, but has yet to delve more deeply into the issue. Jesse Wegman, *The Injustice of Marijuana Arrests*, N.Y. TIMES, July 28, 2014, <http://www.nytimes.com/2014/07/29/opinion/high-time-the-injustice-of-marijuana-arrests.html?opinion-series>. Cf. Hashimoto, *supra* note 95, at 498 n.148 (acknowledging in her proposal for lowering misdemeanor penalties that while "there may be immigration consequences stemming from misdemeanor convictions" that do not carry a right to counsel, "[t]o the extent that a resource allocation choice must be made, the resources should go to those charged with offenses that will lead to imprisonment in the event of conviction"); see also Chemerinsky et al., *supra* note 107 (not mentioning the potential immigration issues that arise from the proposed laboratories of state experimentation with marijuana legalization).

108. See 21 U.S.C. §§ 802(6), 812(b)(1), 812 Schedule I (c)(10) (2006) (listing marijuana as a Schedule I controlled substance under the federal Controlled Substances Act); see also *Gonzalez v. Raich*, 545 U.S. 1, 33 (2005) (upholding the authority of the federal government to criminalize marijuana, even when legalized at the state level for medicinal purposes).

any law or regulation . . . relating to a controlled substance” deportable.¹⁰⁹ This deportability ground then refers to section 802 of Title 21 of the United States Code, which lists marijuana as a Schedule I controlled substance.¹¹⁰

The INA’s broad definition of conviction means that a wide array of criminal dispositions can trigger this deportability ground. For the purposes of the INA, a conviction can occur when there is “a formal judgment of guilt . . . entered by a court,” or when the defendant pleads *nolo contendere* or admits facts that would be sufficient for a finding of guilt.¹¹¹ A deferred adjudication, where the defendant pleads guilty initially but has the charges dismissed later, also counts as a conviction for immigration purposes.¹¹² Suspended sentences and probation both count as impositions of punishment sufficient to constitute a conviction.¹¹³ Violations and infractions¹¹⁴ are also considered convictions for immigration purposes as long as the proceedings require that guilt be proven beyond a reasonable doubt.¹¹⁵

There is an explicit exception for marijuana use built into the deportability ground: An individual is deportable if convicted of a controlled substance offense “other than a single offense involving possession for one’s own use of 30 grams or less of marijuana.”¹¹⁶ This is known as the personal use exception.¹¹⁷ As the government bears the burden of proving deportability in removal proceedings,¹¹⁸

109. INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i) (2006).

110. 21 U.S.C. § 802(6).

111. INA § 101(a)(48)(A), 8 U.S.C. § 1101(a)(48)(A) (2006).

112. *See* *Batrez Gradiz v. Gonzales*, 490 F.3d 1206, 1208 (10th Cir. 2007); *Punu*, 22 I. & N. Dec. 224, 227, 230 (B.I.A. 1998).

113. INA § 101(a)(48)(B) specifies that a suspended sentence counts as a term of imprisonment. 8 U.S.C. § 1101(a)(48)(B) (2006). The statute does directly address probation, but the Board of Immigration Appeals (BIA) has interpreted probation to constitute punishment. *Punu*, 22 I. & N. at 224.

114. In many states, a violation is an offense for which only minimal criminal penalties can be imposed. In Oregon, for example, a violation may be punished with a fine but not by imprisonment. OR. REV. STAT. § 153.018(1) (2013). In New York, a violation can be punished with no more than fifteen days imprisonment. N.Y. PENAL LAW ANN. § 70.15(4) (West 2014). Some states call these low-level offenses infractions. *See, e.g.*, CAL. PENAL CODE ANN. § 19.6 (West 2014) (noting that an infraction is not punishable by imprisonment).

115. *Eslamizar*, 23 I. & N. Dec. 684, 688–89 (B.I.A. 2004) (holding that a noncitizen’s conviction for a Class A violation under Oregon law, which required that guilt be proven only by a preponderance of evidence and not beyond a reasonable doubt, did not count as a conviction for immigration purposes). This type of conviction could still be sufficient to trigger grounds of inadmissibility, however, because inadmissibility grounds do not require a criminal conviction.

116. INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i) (2006).

117. *See, e.g.*, *Rodriguez v. Holder*, 619 F.3d 1077, 1078 (9th Cir. 2010) (denying petitioner’s claim that he was entitled to the personal use exception of INA § 1227(a)(2)(B)(i) despite his previous convictions for possession of a controlled substance).

118. *See* INA § 240(c)(3)(A), 8 U.S.C. § 1229a(c)(3)(A) (2006) (“[T]he Service has the burden [in removal proceedings] of establishing by clear and convincing evidence that . . . the alien is

when the government attempts to deport a noncitizen for a marijuana conviction, it must show that the noncitizen's conviction does not fit under this legislative exception.¹¹⁹

But it is often not difficult for the government to prove that a conviction does not fit into the personal use exception. A noncitizen clearly falls outside the personal use exception if he has several different marijuana-related offenses on his record, as the plain text of the statute excepts only "a single offense."¹²⁰ If any part of the convicted offense implicates something more serious than "simple possession," the personal use exception will be equally inapplicable. For example, a conviction for possessing a small amount of marijuana while incarcerated does not qualify for the exception,¹²¹ nor would a conviction for the social sharing of marijuana.¹²²

Additionally, the Board of Immigration Appeals (BIA) recently held in *Matter of Davey*¹²³ that adjudicators should determine whether the personal use exception applies by looking at the conduct underlying the conviction in question.¹²⁴ This is called the circumstance-specific approach, which allows the immigration judge to look beyond the elements of the statute of conviction and examine other evidence from the criminal case to determine if the conviction makes the noncitizen deportable.¹²⁵ This approach differs from the categorical approach, which is used for most deportability grounds, and which limits the judge to examining "the elements of an offense that was the subject of a prior conviction[] in order to determine whether the conviction triggers a penalty."¹²⁶

Use of the circumstance-specific approach in this context is now in many ways a double-edged sword for noncitizens fighting marijuana-related deportability grounds. In the past, the BIA interpreted the "single offense" language in

deportable. No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.").

119. See *Medina v. Ashcroft*, 393 F.3d 1063, 1065 n.5 (9th Cir. 2005); *Sandoval v. I.N.S.*, 240 F.3d 577, 581 (7th Cir. 2001).

120. See, e.g., *Rodriguez*, 619 F.3d at 1079 ("[S]ection 1227(a)(2)(B)(i) exempts from removability solely those aliens who have (1) committed only one controlled substance offense, where (2) that offense is possession for personal use of less than 30 grams of marijuana.").

121. *Martinez-Zapata*, 24 I. & N. Dec. 424, 430-31 (B.I.A. 2007).

122. This was illustrated by the Alex hypothetical in the Introduction. See, e.g., CAL. HEALTH & SAFETY CODE § 11360 (2014) (criminalizing the social sharing of marijuana). Social sharing convictions would not qualify for the personal use exception since the marijuana was possessed in part for the use of others.

123. *Davey*, 26 I. & N. Dec. 37 (B.I.A. 2012).

124. *Id.* at 39-40.

125. *Id.* at 40.

126. Immigrant Legal Resource Center, *California Quick Reference Chart and Notes N-36* (Feb. 2010), available at http://www.ilrc.org/files/cal_chart_notes_03.pdf.

the personal use exception to refer to the number of convictions on the person's record, and not to the number of offenses the person committed.¹²⁷ Because multiple convictions can arise from the commission of only one offense, that reasoning was used to justify the deportation of Luis Benjamin Martinez-Mercado based on his Utah convictions for possession of marijuana and possession of drug paraphernalia.¹²⁸ Both convictions stemmed from the same incident—officers arrested Martinez-Mercado for possession of an apple that was adapted for smoking pot.¹²⁹ Because the apple contained marijuana residue, he was convicted of two offenses: possession of marijuana and possession of drug paraphernalia. The BIA found that Martinez-Mercado's convictions did not fall under the personal use exception because it read the term "offense" as "conviction" and rejected the argument that "offense" should be understood as "act."¹³⁰ Thus, Martinez-Mercado's two convictions were understood as two offenses instead of one, and he was not able to invoke the personal use exception to avoid deportation.

The BIA's more recent decision in *Matter of Davey* indicates a move away from such an expansive interpretation of what constitutes an offense. In *Davey*, the respondent's case was quite similar to Martinez-Mercado's: Jennifer Adassa Davey was convicted of both simple possession and possession of drug paraphernalia for the single act of possessing less than 10 grams of marijuana in a plastic bag.¹³¹ Using the circumstance-specific approach, the BIA found that these facts described a "single offense," and therefore that the respondent's conduct fell into the personal use exception and protected her from deportability.¹³² Thus, in some cases, the circumstance-specific approach could now protect noncitizens with multiple marijuana-related convictions stemming from a single offense.

And yet, for other noncitizens, the circumstance-specific approach will eviscerate the much-needed protections provided by the categorical approach. In particular, noncitizens convicted under statutes that criminalize possession of marijuana without specifying that the defendant possessed less than 30 grams of the substance can now have facts in the record of conviction used against them to

127. *Martinez-Mercado v. Holder*, 492 F. App'x. 890, 893–94 (10th Cir. 2012) (affirming the BIA interpretation of a "single offense").

128. *Id.* at 891–92 (citing UTAH CODE ANN. §§ 58-37-8(2)(a)(i), 58-37a-5(1) (West 2012)).

129. Joe Palazzolo, *Do Not Put That in Your Pipe and Smoke It*, WALL ST. J. LAW BLOG, (July 27, 2012, 4:33 PM), www.blogs.wsj.com/law/2012/07/27/do-not-put-that-in-your-pipe-and-smoke-it.

130. The court rejected *Martinez-Mercado's* attempted analogy to the analysis necessary under the multiple conviction deportability ground of INA § 237(a)(2)(A)(ii), which requires an inquiry into whether the conviction arose "out of a single scheme of criminal misconduct." *Martinez-Mercado*, 492 F. App'x. at 893 (quoting INA § 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii) (2006)). This reading of the statute was affirmed by the Tenth Circuit. *Id.*

131. *Davey*, 26 I. & N. Dec. 37, 41 (B.I.A. 2012).

132. *Id.*

prove that the exception does not apply. For example, in Minnesota, unlawful possession of less than 42.5 grams of marijuana is a petty misdemeanor.¹³³ Under the categorical approach, all convictions under this statute would qualify for the personal use exception, since the government bears the burden of proving that offense involved possession of more than 30 grams of marijuana and would not be able to do so with the statutory text alone. Under a circumstance-specific inquiry, however, the government could use information from court documents like sentencing petitions, stipulations, or even police reports to prove that the noncitizen's offense would not fall under the exception.¹³⁴ This, among other factors, shows just how few individuals with marijuana-related convictions are protected from deportability by the personal use exception.

B. Marijuana Offenses Make Noncitizens Who Travel Abroad Inadmissible Upon Return

Unlike the controlled substance deportability ground, the inadmissibility ground for controlled substances does not contain a personal use exception.¹³⁵ Permanent residents have, by definition, already been admitted to the United States through their acquisition of permanent residence and generally are not deemed to be seeking admission when returning to the United States after traveling abroad.¹³⁶ But under a change in the law made in 1996, permanent residents are now deemed to be seeking admission under certain circumstances, including when a permanent resident has committed an offense that would make them inadmissible.¹³⁷ Thus, a permanent resident who travels abroad after being convicted of a marijuana offense would be deemed to be seeking admission upon their return to the United States, and would then be found inadmissible at the border when seeking entry.

133. MINN. STAT. ANN. §§ 152.01(16), 152.027(4) (West 2011 & West Supp. 2014).

134. See *Nijhawan v. Holder*, 557 U.S. 29, 42–43 (2009) (allowing use of a sentencing report to prove deportability under a circumstance-specific inquiry); see also Sejal Zota, *Practice Advisory: Matter of Davey & the Categorical Approach* (Jan. 15, 2013), available at http://nationalimmigrationproject.org/legalresources/practice_advisories/pa_MatterOfDavey&TheCategoricalApproach-16Jan2013.pdf. Immigration court proceedings do not follow the Federal Rules of Evidence, and therefore documents that would otherwise be excluded as hearsay are often admissible. See U.S. DEPT OF JUSTICE, EOIR IJ BENCHBOOK, Evidence Guide § I(A)(3)(c), available at http://www.justice.gov/eoir/vll/benchbook/tools/Evidence_Guide.pdf.

135. INA § 212(a)(2)(A)(i-ii), 8 U.S.C. § 1182(a)(2)(A)(i-ii) (2012).

136. INA § 101(a)(13)(C), 8 U.S.C. § 1101(a)(13)(C) (2012).

137. INA § 101(a)(13)(C)(v), 8 U.S.C. § 1101(a)(13)(C)(v) (2012); see also Collado-Munoz, 21 I. & N. Dec. 1061, 1063–64 (B.I.A. 1998) (interpreting the application of INA § 101(a)(13)(C)(v) to permanent residents returning from travel abroad after the law's change in 1996).

In *Vartelas v. Holder*,¹³⁸ the Supreme Court held that this 1996 change could not be applied to permanent residents who committed the relevant crime before the law was enacted.¹³⁹ Thus, a permanent resident with a pre-1996 conviction for marijuana use would not be deemed inadmissible upon return from travel abroad. But any permanent resident with a marijuana conviction entered after 1996 would be deemed inadmissible to the United States when trying to return from international travel.

Considering the increased affordability of international travel and the fact that many permanent residents have family members who remain in other countries, this twist in the law is of no small importance for thousands of permanent residents. Travelling abroad basically eviscerates the protections of the personal use exception for any permanent resident with a marijuana conviction. When seeking entry at an international airport or border crossing, a permanent resident with a marijuana conviction would be deemed inadmissible and would be placed in removal proceedings. And, as explained below, any relief from removal would be severely limited by the very same conviction.

C. Marijuana Offenses Limit Relief From Removal

Permanent residents who are deportable on controlled substance grounds may be eligible for discretionary relief in the form of cancellation of removal.¹⁴⁰ To qualify, a permanent resident must have acquired (1) five years of lawful permanent residency, (2) seven years of continuous lawful residence in the United States, and (3) no aggravated felony convictions.¹⁴¹ The commission of a deportable offense or the initiation of removal proceedings stops the clock for the purposes of accruing the required period of continuous residence.¹⁴² Though an applicant need not show a particular degree of hardship to be granted cancellation of removal, the grant of relief is discretionary and depends on a “balance [of] the adverse factors evidencing the alien’s undesirability as a permanent resident with the social and humane considerations presented in his (or her) behalf.”¹⁴³ Additionally, only four thousand lawful permanent residents may receive a grant of

138. 132 S. Ct. 1479 (2012).

139. *Id.* at 1487, 1492.

140. INA § 240A(a), 8 U.S.C. § 1229b(a) (2012).

141. *Id.* Aggravated felony is a term of art in immigration law that often describes crimes that are neither felonies nor particularly serious. See INA § 101(a)(43) for a list of crimes that are considered to be aggravated felonies.

142. INA § 240A(d)(1), 8 U.S.C. § 1229b(d)(1) (2012).

143. C-V-T-, 22 I. & N. Dec. 7, 11 (B.I.A. 1998) (quoting *Marin*, 16 I. & N. Dec. 581, 584–85 (B.I.A. 1978)).

cancellation of removal each year.¹⁴⁴ Thus, cancellation of removal may provide immigration relief to some permanent residents who have been convicted of non-serious marijuana offenses, but it will be denied to many who do not meet the continuous residence requirements, who are not deemed to merit a favorable exercise of discretion, or who apply after the satisfaction of the annual cap.¹⁴⁵

Because of an interesting loophole in the INA, some permanent residents who are deportable may also avoid deportation through another avenue for relief—reapplying for lawful permanent resident status. Although it sounds counterintuitive at first blush, some lawful permanent residents can avoid deportation by reapplying for lawful permanent residence through a qualifying family member while in deportation proceedings.¹⁴⁶ This tactic can be especially beneficial for individuals who have committed an offense that makes them deportable, but that does not simultaneously make them inadmissible, such as unlawful possession of a firearm.¹⁴⁷ In order to use this approach, however, the applicant must otherwise be admissible to the United States. Since INA section 212(a)(2)(A)(II) makes any alien who has been “convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of . . . a violation of . . . any law or regulation . . . relating to a controlled substance” inadmissible to the United States, a single marijuana offense, no matter how minor, would make an individual presumptively ineligible to adjust status in removal proceedings.¹⁴⁸ Thus, this avenue for relief is practically unavailable for permanent residents with marijuana convictions.

144. INA § 240A(e)(1), 8 U.S.C. § 1229b(e)(1) (2012).

145. *See, e.g.*, Nelson, 25 I. & N. Dec. 410, 412, 415 (B.I.A. 2011) (finding that an LPR who was removable because of one marijuana possession conviction was ineligible for cancellation of removal because the offense was committed within the first seven years of his continuous residence in the United States and terminated the accrual of his continuous residence period). When the annual cap for cancellation of removal has been reached, an immigration judge must delay a decision on the case until more spaces become available in the following fiscal year. 8 C.F.R. § 240.21(c)(1) (2012).

146. INA § 245(a), (i), 8 U.S.C. § 1255(a), (i) (2012).

147. *See* Rainford, 20 I. & N. Dec. 598, 602 (B.I.A. 1992).

148. *See* INA § 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II) (2012). There is a limited waiver of inadmissibility available for marijuana-related inadmissibility under section 212(h). But individuals are only eligible if convicted of a single offense related to simple possession of less than 30 grams of marijuana, and, unless the conviction occurred over fifteen years ago, must additionally prove that their deportation would cause extreme hardship to a qualifying U.S. citizen or lawful permanent resident relative. INA § 212(h), 8 U.S.C. § 1182(h) (2012). Data on section 212(h) waiver approval and denial rates is unavailable, but State Department reports on challenges to controlled substance inadmissibility findings provide an indication of just how high the waiver bar is set. In 2012, less than 15 percent of individuals found ineligible by consulates for immigrant visas on controlled substance grounds were able to overcome that inadmissibility via a waiver or by proving that the ground did not apply. U.S. DEPT OF STATE, IMMIGRANT AND NONIMMIGRANT VISA INELIGIBILITIES (BY GROUNDS FOR REFUSAL UNDER THE IMMIGRATION AND

To summarize, the controlled substance grounds of deportability and inadmissibility operate very harshly against lawful permanent residents who have committed minor marijuana offenses. Permanent residents who have committed a marijuana offense that falls outside of the limited exception to deportability will often be deported and prevented from applying for several types of relief from deportation for which they would otherwise qualify. This near-automatic imposition of harsh immigration consequences operates even in the face of the significantly lowered criminal penalties for marijuana use, as detailed in Part I. This mismatch between the minor nature of the criminal offense and severity of the resulting immigration consequences may lead to violations of the Sixth Amendment right to counsel, as a closer look at the Supreme Court's recent decision in *Padilla v. Kentucky*¹⁴⁹ reveals.

III. THE RIGHT TO COUNSEL AND IMMIGRATION CONSEQUENCES

As confirmed in the groundbreaking Supreme Court case *Padilla v. Kentucky*,¹⁵⁰ noncitizen criminal defendants have a Sixth Amendment right to complete, affirmative, and accurate advice regarding the immigration consequences of criminal charges.¹⁵¹ Until *Padilla*, most federal and state courts held that giving advice on immigration consequences fell outside of a defense attorney's responsibilities.¹⁵² Thus, defense attorneys could advise clients to accept immigration-unsafe pleas without warning them of the risk of deportation or other adverse immigration consequences. *Padilla* changed the doctrinal landscape significantly for noncitizens charged with crimes. Now, noncitizen defendants have a constitutional right to receive complete and accurate advice from a defense attorney regarding the potential immigration consequences of the charges faced.¹⁵³

A closer look at *Padilla's* reasoning shows how much the case depends on the straightforward nature of the very same deportability ground that is implicated by marijuana offenses (the controlled substance deportability ground). Because individuals do not have a constitutional right to counsel in all misdemeanor

NATIONALITY ACT), FISCAL YEAR 2012, available at <http://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2012AnnualReport/FY12AnnualReport-TableXX.pdf>.

149. 559 U.S. 356 (2010).

150. *Id.*

151. *Id.* at 366–68.

152. See *Chaidez v. United States*, 133 S. Ct. 1103, 1109 (2013) (noting that, before *Padilla*, courts in thirty states and all ten federal circuits found that advice on immigration consequences fell outside of a defense attorney's Sixth Amendment responsibilities).

153. *Padilla*, 559 U.S. at 368.

cases,¹⁵⁴ and because penalties for marijuana use increasingly do not include jail time,¹⁵⁵ defendants are more and more likely to face simple marijuana possession charges without the assistance of counsel. Unrepresented noncitizen defendants are deprived of a lawyer's guidance and advice on the extremely harsh immigration consequences that can result from such convictions. This Part explores how *Padilla's* protections appear to have a gap in an area where they are most needed—to protect individuals charged with very minor drug offenses from suffering the severely disproportionate immigration consequence of deportation.¹⁵⁶

A. The *Padilla v. Kentucky* Decision

The Sixth Amendment right to effective assistance of counsel has generally been limited to the context of criminal law. Individuals have no right to an attorney in civil proceedings, even when the proceedings may result in a loss of liberty through civil confinement.¹⁵⁷ But the groundbreaking *Padilla* opinion confirmed that the Sixth Amendment right to effective assistance of counsel does include affirmative and accurate advice on the technically civil immigration consequences of criminal charges.¹⁵⁸

A review of *Padilla* illustrates the importance of this protection for individuals facing drug charges. Jose Padilla, a longtime lawful permanent resident, was indicted in Kentucky for various crimes related to the unlawful transportation of marijuana.¹⁵⁹ Padilla's attorney advised him to plead guilty to the drug charges and informed him—incorrectly—that he “did not have to worry about immigra-

154. See *Scott v. Illinois*, 440 U.S. 367, 369 (1979) (holding that the Sixth Amendment does not require appointment of counsel for a criminal defendant when the charged offense authorizes a sentence of imprisonment that is not actually imposed); *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (holding that a criminal defendant cannot be sentenced to actual imprisonment unless provided with counsel).

155. See discussion *supra* Part I for examples of lowered penalties and decriminalization throughout the United States.

156. Jason Cade makes a related point about the gap in *Padilla's* protection regarding misdemeanors more generally. Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751, 1775 (2013) (noting the pressure low-level misdemeanant defendants face to plead guilty quickly, without a chance to be advised of or to consider collateral consequences). As Cade points out, marijuana offenses are not the only area of criminal law in which this representation gap occurs. See, e.g., *Johnson v. Holder*, 413 F. App'x 435, 438 (3d Cir. 2010) (remanding for reconsideration of a deportation order issued against a twenty-five year legal resident of the United States for the offense of turnstile jumping, which is a low-level misdemeanor that would not entitle a defendant to representation).

157. See, e.g., *Turner v. Rogers*, 131 S. Ct. 2507, 2520 (2011).

158. *Padilla*, 559 U.S. at 373.

159. Specifically, Mr. Padilla was indicted for crimes including trafficking more than five pounds of marijuana, possession of marijuana, and possession of drug paraphernalia. *Commonwealth v. Padilla*, 253 S.W.3d 482, 483 (Ky. 2008), *rev'd*, 559 U.S. 356 (2010).

tion status since he had been in the country so long.”¹⁶⁰ While serving his prison sentence, Padilla filed a request for postconviction relief on the grounds that his attorney’s incorrect advice constituted ineffective assistance of counsel, as he alleged that he would have not pled guilty and instead would have proceeded to trial had he known that his conviction would make his deportation virtually mandatory.¹⁶¹

The Kentucky Supreme Court denied his request, holding that the Sixth Amendment right to effective assistance of counsel does not guarantee advice regarding potential deportation because deportation is a merely a collateral consequence of a conviction, and not part of the criminal punishment itself.¹⁶² In a groundbreaking opinion, the United States Supreme Court reversed, holding that the Sixth Amendment right to effective assistance of counsel includes a right to affirmative advice on the immigration consequences of criminal charges.¹⁶³

Justice Alito’s concurrence would have limited the scope of this immigration advice to protection from the unreasonable provision of incorrect advice and a generic warning that the defendant should consult with an immigration attorney because of possible adverse immigration consequences of the criminal case.¹⁶⁴ The majority agreed with Justice Alito’s view in situations where the consequences of a plea are not straightforward: “When the law is not succinct and straightforward . . . a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.”¹⁶⁵ When the immigration consequences are clear, however, *Padilla* holds that effective assistance of counsel requires a defense attorney to provide affirmative, specific, and correct advice to her client.¹⁶⁶

The opinion does not attempt to classify which types of criminal charges implicate removability in a sufficiently straightforward manner to require com-

160. *Id.*

161. *Padilla*, 559 U.S. at 359. Padilla pled guilty to an aggravated felony, which made his deportation practically unavoidable. Noncitizens with aggravated felony convictions are deportable under INA § 237(a)(2)(A)(iii), and are ineligible from most forms of relief from removal. INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) (2012); THOMAS ALEXANDER ALEINIKOFF ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 695 (7th ed. 2012) (explaining that aggravated felons are ineligible for asylum, cancellation of removal, and voluntary departure, and that they face a lifetime bar to re-entering the United States without express permission from the Attorney General).

162. *Padilla*, 253 S.W.3d at 485.

163. *Padilla*, 559 U.S. at 373.

164. *Id.* at 374 (Alito, J., concurring).

165. *Id.* at 368.

166. *Id.*

plete advice.¹⁶⁷ Indeed, such a classification would be nearly impossible, considering that different offenses trigger immigration consequences in different ways, depending on various factors like the elements of the criminal statute, the length of the possible sentence, and the length of the actual sentence imposed.¹⁶⁸ The opinion does hold, however, that the criminal statute in Padilla's underlying case was sufficiently "succinct, clear, and explicit in defining the removal consequence" that his attorney could have "easily . . . determined" that deportation would be presumptively mandatory.¹⁶⁹ The removal statute in question was section 237(a)(2)(B)(i) of the INA, which makes any noncitizen deportable who at any time after admission has been convicted of a controlled substance offense, "other than a single offense involving possession for one's own use of 30 grams or less of marijuana."¹⁷⁰ This is the same deportation ground implicated by most minor marijuana charges. Thus, the *Padilla* opinion clearly states that an effective defense attorney should affirmatively advise a noncitizen charged with a marijuana possession offense of the resulting immigration consequences.

B. *Padilla* and Marijuana Possession Charges

Proper *Padilla* advice may not be all that helpful to some noncitizens facing marijuana possession charges. If a permanent resident already has a controlled

167. The opinion only notes that, because of immigration law's complexity, "[t]here will . . . undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain." *Id.* César Cuauhtémoc García Hernández has pointed out how this lack of clarity has left state courts with the responsibility of determining whether an immigration consequence was sufficiently clear to trigger the right to affirmative *Padilla* advice. César Cuauhtémoc García Hernández, *When State Courts Meet Padilla: A Concerted Effort Is Needed to Bring State Courts Up to Speed on Crime-Based Immigration Law Provisions*, 12 LOY. J. PUB. INT. L. 299 (2011). As García Hernández points out, state courts are generally unfamiliar with immigration law and unequipped to do so, as reflected by a multitude of state court decisions that misinterpret immigration law. *Id.* at 314–26.

168. Aggravated felonies provide an example of this complexity. Noncitizens who have been convicted of aggravated felonies are deportable under INA § 237(a)(2)(A)(iii). 8 U.S.C. § 1227(a)(2)(A)(iii) (2012). To give an example, a theft offense with a sentence of at least one year is an aggravated felony for immigration purposes. INA § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G) (2006). Because the maximum misdemeanor penalty varies from state to state, a similar low-level theft offense will be an aggravated felony in certain states but not others. Washington recently enacted a law that changed the maximum penalty for a gross misdemeanor to 364 days instead of one year, with the express purpose avoiding the aggravated felony consequence for fairly minor misdemeanor offenses. Kristi Pihl, *New Law Reduces Misdemeanor Sentence by One Day*, TRICITY HERALD, Apr. 24, 2011, <http://www.komonews.com/news/local/120571514.html>; see *supra* note 161 and accompanying text for further explanation of the immigration consequences of an aggravated felony conviction.

169. *Padilla*, 559 U.S. at 368.

170. INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i) (2012).

substance offense on his record and has no way to contest the current marijuana charges, it may not be possible for his defense attorney to help him avoid deportability.¹⁷¹ Low-level drug possession offenses may be especially difficult to avoid, especially in light of the fact that many drug possession crimes are now “strict liability crime[s] in which mere presence in a location where there are drugs is sufficient to prove constructive possession,”¹⁷² severely limiting the availability of strong defenses in certain cases.¹⁷³

And, as many commentators have pointed out, the *Padilla* court may have been overly optimistic about the possibility that plea bargaining will lead to more just results for most noncitizen criminal defendants. Darryl Brown notes that “[i]mmigration law’s increasingly punitive severity in recent decades has left many fewer offenses that do not trigger mandatory deportation,” and argues that Jose Padilla himself likely had “no realistic options for avoiding immigration law’s harsh mandates.”¹⁷⁴ This caution is particularly relevant for low-level marijuana offenses, since in many cases a defense attorney must find a way to avoid a conviction that has anything to do with a controlled substance to keep her client free of adverse immigration consequences. Immigration-safe outcomes may seem even less likely in light of other harsh realities in the world of misdemeanor criminal defense: Attorneys face crushing caseloads, prosecutors may be unwilling to negotiate, and defendants may feel time-pressured to accept a plea quickly to obtain release from jail.¹⁷⁵

171. Additionally, *Padilla*’s protections are not retroactive, meaning that noncitizens whose attorneys failed to properly warn them of the immigration consequences of criminal charges before March 31, 2010 (the date *Padilla* was decided) cannot now challenge those convictions on *Padilla* grounds. *Chaidez v. United States*, 133 S. Ct. 1103, 1105 (2013). Relief may remain available, however, to noncitizens whose convictions were not yet final on March 31, 2010, who were affirmatively misadvised regarding the criminal consequences of their case, or whose right to counsel under state law was violated. See IMMIGRANT DEFENSE PROJECT, SEEKING POST-CONVICTION RELIEF UNDER *PADILLA V. KENTUCKY* AFTER *CHAIDEZ V. U.S.* (2013) <http://immigrantdefenseproject.org/wp-content/uploads/2013/03/Chaidez-advisory-FINAL-201302281.pdf>.

172. Morawetz, *supra* note 15, at 167 (citing MARKUS D. DUBBER, VICTIMS IN THE WAR ON CRIME 32–39 (2002)).

173. The BIA has held that immigration consequences can result from controlled substances offenses that require no mens rea for the underlying conviction. *Esqueda*, 20 I. & N. Dec. 850, 860 (B.I.A. 1994) (“We find nothing in the legislative history of the Anti-Drug Abuse Act of 1986 to indicate that Congress meant to restrict its expansive language by allowing an exception to be made for statutes lacking a mens rea component.”).

174. Darryl K. Brown, *Why Padilla Doesn’t Matter (Much)*, 58 UCLA L. REV. 1393, 1399 (2011). As for Jose Padilla, it remains to be seen if he will be able to escape the immigration consequences of his drug trafficking charges. A Kentucky court recently vacated his conviction, meaning he now has the chance to proceed to trial and hopefully avoid a conviction that will make him deportable. *Padilla v. Commonwealth*, 381 S.W.3d 322, 330–31 (Ky. 2012).

175. See Cade, *supra* note 156 (detailing the various pressures within the criminal justice system that de facto force noncitizen defendants to quickly accept pleas).

But the assistance of an attorney who properly complies with her *Padilla* responsibilities will be crucial for many noncitizens facing such charges, and this assistance is noticeably absent in a significant number of marijuana cases being prosecuted throughout the country. *Padilla* contemplates that a defense attorney will help her client by “plea bargain[ing] creatively with the prosecutor in order to craft a conviction and sentence that reduce[s] the likelihood of deportation.”¹⁷⁶ A defense attorney may be able to negotiate a deal where her client pleads guilty to a different type of offense that carries similar criminal penalties but does not have such drastic immigration consequences. These arrangements can often be made in a way that benefits the goals of the criminal justice system: Defendants can agree to pay increased fines, perform additional community service, or, in some cases, serve additional jail time in exchange for the opportunity to plead to an alternate or lesser charge that carries fewer immigration consequences.¹⁷⁷

For example, the Immigrant Defense Project’s guide to determining the immigration consequences of common New York offenses recommends that attorneys help clients avoid unlawful possession of marijuana charges by negotiating a plea to alternative charges like disorderly conduct or trespass.¹⁷⁸ New York also makes adjournment in contemplation of dismissal (ACD)¹⁷⁹ available specifically for marijuana charges.¹⁸⁰ An ACD does not require the defendant to plead guilty, meaning that an ACD is not considered to be a conviction under the INA.¹⁸¹ Since the ACD mechanism is available specifically when necessary for the “furtherance of justice,” a marijuana ACD may be very appropriate when adverse immigration consequences are imminent. In cities like New York that have implemented policies to protect noncitizen city residents from immigration en-

176. *Padilla*, 559 U.S. at 373. The *Padilla* majority even suggests that this arrangement may provide a benefit to the prosecution, as the defendant may have “a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does.” *Id.*

177. Cade, *supra* note 156, at 1774.

178. IMMIGRANT DEFENSE PROJECT, QUICK REFERENCE CHART FOR DETERMINING IMMIGRATION CONSEQUENCES OF COMMON NEW YORK OFFENSES A-69 (5th ed. 2011), available at http://immigrantdefenseproject.org/wp-content/uploads/2011/02/FINALappendix-A_Final5thed2011.pdf.

179. An adjournment in contemplation of dismissal (ACD) allows the criminal court to adjourn the proceedings against the defendant until a future date, with the assumption that the charges will be dismissed at that time. N.Y. CRIM. PROC. LAW § 170.55(2) (McKinney 2012) (“An adjournment in contemplation of dismissal is an adjournment of the action without date, ordered with a view to ultimate dismissal of the accusatory instrument in furtherance of justice.”).

180. N.Y. CRIM. PROC. LAW § 170.56 (McKinney 2012) (allowing adjournment in contemplation of dismissal for certain nonserious marijuana charges).

181. *Id.* (noting that the court shall suspend proceedings “before the entry of a plea of guilty thereto or commencement of a trial thereof”); AM. IMMIGRATION LAWYERS ASS’N, THE WAIVERS BOOK: ADVANCED ISSUES IN IMMIGRATION LAW PRACTICE 327 (Irene Scharf et al. eds., 2011).

forcement efforts,¹⁸² prosecutors may be willing to participate in such negotiations. Some county district attorneys have even created policies that encourage members of their office to take immigration consequences into account as they pursue cases involving immigrants.¹⁸³

The *Padilla* task may be even simpler when a defense attorney represents a lawful permanent resident facing a first marijuana possession charge that falls under the personal use exception. A defense attorney can simply provide a strong warning to her client about the consequences of being convicted of a second offense. Since many noncitizens are unaware of the ways in which seemingly minor criminal charges can adversely affect their immigration status, clear advice regarding the risk accompanying future convictions may make a significant difference for many noncitizen defendants.

Additionally, even when it is not feasible to avoid inadmissibility and deportability problems, defense attorneys can help noncitizen defendants facing marijuana charges avoid convictions that may be aggravated felonies for immigration purposes. An aggravated felony conviction makes a noncitizen presumptively ineligible for almost all types of relief from removal.¹⁸⁴ Certain marijuana-related convictions can be construed as drug trafficking offenses,¹⁸⁵ which trigger the aggravated felony deportation ground.¹⁸⁶

Two recent Supreme Court cases, *Carachuri-Rosendo v. Holder*¹⁸⁷ and *Moncrieffe v. Holder*¹⁸⁸ (both of which are discussed in greater detail in Part IV), make it more difficult for the government to construe low-level drug possession offenses as aggravated felonies.¹⁸⁹ But if a noncitizen's record indicates that his

182. New York City has long been a self-designated sanctuary city, and has taken several affirmative efforts to protect its noncitizen residents. The most recent initiative comes from Mayor Bill de Blasio, who wants to move forward with the creation of municipal identification cards. Emily Ngo, *Bill de Blasio: Municipal IDs for New Yorkers 'Regardless of Immigration Status'*, LONG ISLAND NEWSDAY, Feb. 10, 2014, <http://www.newsday.com/news/new-york/bill-de-blasio-municipal-ids-for-new-yorkers-regardless-of-immigration-status-1.7014010>.

183. See, e.g., Matt O'Brien, *Some Immigrants Charged in Alameda County Courts Could Avoid Deportation Under DA's New Guidelines*, SAN JOSE MERCURY NEWS, Nov. 1, 2012, http://www.mercurynews.com/breaking-news/ci_21900096/some-immigrants-charged-alameda-county-courts-could-avoid.

184. Noncitizens who have committed aggravated felonies are ineligible for asylum, cancellation of removal, and voluntary departure; are prohibited from re-entering the United States for life without advance consent from the Attorney General; and are subject to severe sentence enhancements if they are ever charged with illegal reentry. ALEINIKOFF ET AL., *supra* note 161, at 695 (citations omitted).

185. INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B) (2006).

186. INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227 (a)(2)(A)(iii) (2006).

187. 560 U.S. 563 (2010).

188. 133 S. Ct. 1678 (2013).

189. *Id.*; *Carachuri-Rosendo*, 560 U.S. at 563. Both of these cases are discussed in more detail in Part IV.

second drug-related conviction is predicated in part on a prior drug-related conviction, the second conviction could be construed as a drug-trafficking aggravated felony.¹⁹⁰ Thus, where noncitizens are facing a second or subsequent marijuana charge, a defense attorney's guidance will be crucial to ensure that the latter offense does not make the noncitizen deportable as an aggravated felon.

C. The Absence of *Padilla* Advice for Low-Level Marijuana Charges

Despite the grave importance of receiving accurate advice about the immigration consequences of a marijuana-related offense, noncitizens will not have access to a public defender in jurisdictions where the penalties for marijuana use have been lowered such that defendants are not entitled to state-appointed counsel. This raises serious Sixth Amendment concerns in light of *Padilla*'s clear instructions that noncitizens receive advice about immigration consequences when facing drug charges. Two examples, from two differently situated noncitizens in two different parts of the country, illustrate how the presence or absence of counsel in these situations can make a world of difference.¹⁹¹

Prince William County, Virginia is known not only for being one of the wealthiest counties in the country¹⁹² but also for its anti-immigrant politics.¹⁹³ In spite of the county's wealth, prosecutors in the county recently began waiving jail time for most misdemeanor offenses—including misdemeanor marijuana posses-

190. *Carachuri-Rosendo*, 560 U.S. at 578. The Supreme Court rejected the government's contention that a second drug possession offense, absent a finding of recidivism, was automatically an aggravated felony because it hypothetically could have been charged as a felony if brought in federal court under the Controlled Substances Act. *Id.* The converse of this is that simple possession offenses that have been enhanced because of the existence of a prior drug conviction may be construed as aggravated felonies. *See, e.g.*, *Okon v. Holder*, No. 10-60347, 2011 WL 1773514 at *1 (5th Cir. May 10, 2011) (upholding removal on aggravated felony grounds for a marijuana possession conviction that had been enhanced by a prior 2006 cocaine delivery conviction); *Cuellar-Gomez*, 25 I. & N. Dec. 850, 862 (B.I.A. 2012) (finding a marijuana possession conviction after a prior marijuana possession conviction to be an aggravated felony because the second charge was enhanced because of the defendant's prior conviction).

191. Though both of the following examples involve noncitizens who are nonlawful permanent residents, the scenarios illustrate the same challenges faced by lawful permanent residents facing low-level marijuana charges without the assistance of counsel.

192. Carol Morello, *The D.C. Suburbs Dominate the List of Wealthiest U.S. Counties*, WASH. POST, Dec. 12, 2013, <http://www.washingtonpost.com/blogs/govbeat/wp/2013/12/12/the-d-c-suburbs-dominate-the-list-of-wealthiest-u-s-counties>.

193. For more information on Prince William County's anti-immigrant policing efforts and the community response, see the documentary film *9500 Liberty*. *9500 LIBERTY* (MTV Networks 2009).

sion—as a cost-saving measure.¹⁹⁴ Thus, most noncitizens charged with misdemeanor marijuana possession must negotiate their criminal proceedings alone, without the assistance of an attorney to advise them of the seriousness of the charges. Nineteen-year-old Luis Bladilir Lopez did just that when he faced a misdemeanor marijuana possession charge. Without the assistance of an attorney, Lopez agreed to plead guilty to a marijuana possession charge, pay a fine of \$186, and forfeit his driver's license for six months.¹⁹⁵ This conviction ushered him into ICE custody, and two months later he was deported to Mexico.¹⁹⁶ While court officials and prosecutors claim the policy is entirely due to financial concerns, local advocates claim that this denial of counsel to defendants facing misdemeanor charges intentionally targets the local Latino community for deportation.¹⁹⁷

A few years earlier and several hours north, the well-known British political commentator Andrew Sullivan was ticketed for smoking marijuana on the Cape Cod National Seashore.¹⁹⁸ Even though Massachusetts had recently decriminalized the possession of small amounts of marijuana for personal use,¹⁹⁹ Sullivan had violated a federal regulation that prohibits possessing a controlled substance in a National Park.²⁰⁰ The citation required Sullivan to pay a fine of \$125 or appear in District Court to contest the charge.²⁰¹

Like Lopez, Sullivan was not entitled to a state-appointed defense attorney in these proceedings. Two weeks before he was to appear in court, however, the prosecutor filed a letter seeking to dismiss the ticket “in the interests of justice.”²⁰² At a subsequent hearing, the prosecutor explained that the government was declining to pursue the case because of the adverse effects it would likely have on Sullivan's application for immigration status in the United States.²⁰³ When asked

194. Jeremy Borden, *Immigrants Take Guilty Pleas Without Lawyers and Can Later Be Deported*, WASH. POST, Jan. 27, 2013, http://articles.washingtonpost.com/2013-01-27/local/36583601_1_illegal-immigrants-guilty-plea-jail-time.

195. *Id.*

196. *Id.*

197. A civil rights attorney from Alexandria asserted that these tactics are “knowingly aimed at the Latino community, and [are] part of Prince William's ethnic cleansing program. [Judges] know the law.” *Id.*

198. Jonathan Saltzman, *Dismissed Marijuana Charge Raises Judge's Ire*, B. GLOBE, Sept. 12, 2009, http://www.boston.com/news/local/massachusetts/articles/2009/09/12/dismissed_marijuana_charge_raises_judges_ire.

199. See MASS. ANN. LAWS ch. 94C, § 32L (LexisNexis 2012).

200. 36 C.F.R. § 2.35(b)(2) (2012).

201. *U.S. v. Sullivan*, 652 F. Supp. 2d 136, 137 (D. Mass. 2009).

202. Saltzman, *supra* note 198.

203. *Sullivan*, 652 F. Supp. 2d at 137. Sullivan owns a home in Provincetown, Massachusetts. Saltzman, *supra* note 198.

by the skeptical presiding judge why the charges were being dropped, he explained that “lawyers expert in the field of immigration law had advised them that if Mr. Sullivan were to forfeit the \$125.00 in collateral, it would have an adverse effect on his application [for a certain immigration status in the United States].”²⁰⁴ Sullivan’s private lawyer, Robert Delahunt, Jr., was present in court alongside the prosecutor.²⁰⁵

Presiding Judge Collings was very suspicious of the “preferential treatment” afforded to Sullivan in these proceedings, especially since there were three other individuals charged with the same offense on the docket that same day whose charges were not dropped.²⁰⁶ Though the law left the judge powerless to force the prosecutor to bring charges,²⁰⁷ he issued a memorandum expressing his displeasure with “the apparent derogation of the principle that all persons stand equal before the law.”²⁰⁸

Judge Collings is onto something here: The differential treatment of Lopez and Sullivan is troubling on many levels, though immigrant rights advocates would propose a different solution than the one favored by the Judge. Judge Collings maintained that equal treatment would require the prosecutor to carry forward with the case, in spite of the severe and disproportionate immigration consequences that would result for Sullivan. Functionally, this would mean treating Sullivan like Lopez—as just another defendant, with no court attention to his immigration status or the case’s resulting immigration consequences.

But *Padilla* states emphatically that “counsel must inform her client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.”²⁰⁹ This suggests that, instead of treating Sullivan like Lopez, we should treat Lopez like Sullivan. The glaring difference in outcomes here is based on the absence of counsel for one defendant and the means to obtain counsel for another. As more and more jurisdictions lower the penalties for marijuana use, more and more noncitizens will face low-level marijuana charges without the assistance of a public defender. Save for those who, like Mr. Sullivan, have the resources to obtain private counsel, many noncitizens will be at risk of incurring

204. *Sullivan*, 652 F. Supp. 2d at 137.

205. *Id.* (noting that “[b]oth Assistant U.S. Attorney Lang and Attorney Delahunt explained” the immigration consequences issue to the judge).

206. *Id.* at 137 n.5.

207. *Id.* at 140 (“[F]idelity to the law requires that the Court grant leave to the United States Attorney to dismiss the Violation Notice against Mr. Sullivan, and the Court hereby grants such leave.”).

208. *Id.* at 138.

209. *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010).

serious immigration consequences without any advice about their corresponding rights, possibly in violation of the Sixth Amendment right to counsel.

IV. PROBLEMS OF PROPORTIONALITY

As explored in Part III, noncitizens charged with low-level marijuana offenses are often denied the right to complete and comprehensive advice regarding the immigration consequences of the charges they face, likely in violation of the Sixth Amendment right to counsel. But beyond this problem, another serious concern arises when a noncitizen pleads guilty or is convicted of a marijuana offense even with the assistance of an attorney: Marijuana offenses subject noncitizens to immigration consequences that are severely disproportionate to the nature of the underlying offense. “Proportionality is the notion that the severity of a sanction should not be excessive in relation to the gravity of an offense.”²¹⁰ While proportionality has traditionally played a role in both criminal and civil law,²¹¹ immigration laws have customarily been insulated from judicial review on proportionality grounds.²¹² This is why possessing a single marijuana cigarette on two separate occasions can effectively banish a lawful permanent resident from the United States for a lifetime.²¹³

This Part will explore how three recent Supreme Court decisions—*Padilla v. Kentucky*,²¹⁴ *Carachuri-Rosendo v. Holder*,²¹⁵ and *Moncrieffe v. Holder*²¹⁶—suggest that there is room for a proportionality analysis when lawful permanent residents face nearly automatic deportation for minor drug offenses.²¹⁷ In *Padilla*,

210. Michael Wishnie, *Immigration Law and the Proportionality Requirement*, 2 U.C. IRVINE L. REV. 415, 416 (2012).

211. *Id.*

212. See Angela M. Banks, *The Normative and Historical Cases for Proportional Deportation*, 62 EMORY L.J. 1243 (2013) (proposing that proportionality play a role in immigration law).

213. See, e.g., Nina Bernstein, *How One Marijuana Cigarette May Lead to Deportation*, N.Y. TIMES, Mar. 30, 2010, <http://www.nytimes.com/2010/03/31/nyregion/31drug.html?pagewanted=all> (telling the story of Jerry Lemaine, a lawful permanent resident who was put in deportation proceedings after paying a \$100 fine for possession of one marijuana cigarette because he had also been caught with marijuana as a teenager).

214. 559 U.S. 356 (2010).

215. 560 U.S. 563 (2010).

216. 133 S. Ct. 1678 (2013).

217. See Wishnie, *supra* note 210, at 447 (quoting *Padilla*, 559 U.S. at 362) (explaining how *Padilla*'s holding that deportation is an “integral part . . . of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes” opens the door to proportionality review in deportation cases); Maritza I. Reyes, *Moncrieffe: Lessons in Crimmigration Law*, CRIMMIGRATION (Apr. 30, 2013, 9:00 AM), <http://crimmigration.com/2013/04/30/moncrieffe-lessons-in-crimmigration-law> (pointing out that three recent Supreme Court cases—*Moncrieffe v. Holder*, *Carachuri-Rosendo v. Holder*, and *Lopez v. Gonzalez*—all involved the Supreme Court intervening

the Court stopped short of construing deportation as criminal punishment, but it did describe deportation as “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.”²¹⁸ Then, in *Carachuri-Rosendo* and *Moncrieffe*, the Supreme Court expressed deep concern with the government’s attempts to automatically deport minor drug offenders.²¹⁹ The Court’s recognition of the “integral . . . [and] important part” deportation plays in the criminal process, combined with an emerging concern with proportionality, may indicate that there is room for proportionality review of the immigration consequences of minor marijuana offenses as well.

A. The Insulation of Immigration Decisions From Searching Judicial Review

For over a century, two factors have worked together to insulate immigration law decisions from searching judicial review: the plenary power doctrine and deportation’s noncriminal classification. The plenary power doctrine holds that because of immigration law’s connection to matters of foreign policy and the national interest, the judicial branch should largely avoid questioning Congressional and executive branch decisions in this area, even on constitutional grounds.²²⁰ This leaves Congress with broad discretion to set guidelines for immigrant admission and deportation, even when those guidelines are created and enforced in ways that violate our fundamental understandings of justice.²²¹ Courts have relied on the plenary power doctrine to uphold immigration laws that explicitly discriminate based on constitutionally protected classifications like race,²²² religion,²²³ and gender,²²⁴ even though these discriminatory classifications would

to halt the automatic deportation of lawful permanent residents for minor drug possession offenses).

218. *Padilla v. Kentucky*, 559 U.S. 356 (2010).

219. See *infra* Part IV.B.

220. See Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 547 (1990).

221. ALEINIKOFF ET AL., *supra* note 161, at 194–95.

222. See DANIEL KANSTROOM, *DEPORTATION NATION: OUTSIDERS IN AMERICAN HISTORY* 113–22 (2007) (describing anti-Chinese animus that led to laws prohibiting Chinese immigration in the late nineteenth century).

223. See ALEINIKOFF ET AL., *supra* note 161, 1031–35 (laying out allegations that the National Security Exit-Entry Registration System created after the attacks of September 11 was designed to target noncitizens from primarily Muslim countries).

224. See *U.S. v. Flores-Villar*, 536 F.3d 990, 993 (9th Cir. 2008) (rejecting equal protection challenge brought to a statute making it more difficult for the children of unwed United States citizen fathers to receive United States citizenship).

likely not withstand strict scrutiny if used to draw distinctions between citizens of the United States.

Additionally, since the beginning of federal immigration law's existence, deportation has been considered a civil sanction and not a criminal punishment.²²⁵ This proposition was most clearly articulated in a late nineteenth century case, *Fong Yue Ting v. U.S.*,²²⁶ where three Chinese laborers challenged their deportation orders for failing to obtain certificates of residence as required by the renewal of the Chinese Exclusion Act.²²⁷ The U.S. Supreme Court justified its affirmance of the laborers' removal by declaring "deportation is not punishment for a crime. . . . It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions . . . the government . . . has determined that his continuing to reside here shall depend [upon]."²²⁸

Fong Yue Ting is firmly rooted in a history of racist exclusionary immigration policies. To obtain the necessary residency certificates, the laborers were required to present the testimony of at least "one credible white witness" to affirm their residence in the country.²²⁹ This law was part of a series of exclusion laws aimed explicitly at Chinese laborers who were the targets of widespread discrimination and violence during this period.²³⁰ But in spite of its problematic origins, *Fong Yue Ting* continues to be cited in modern jurisprudence to affirm the idea that substantive immigration decisions are "virtually immune from judicial review."²³¹

The combination of the plenary power doctrine and deportation's classification as a noncriminal sanction essentially insulates the substance of many depor-

225. Robert Pauw, *A New Look at Deportation as Punishment: Why At Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305, 307 (2000).

226. 149 U.S. 698 (1893).

227. *Id.* The Geary Act of 1892 renewed the exclusion of Chinese laborers mandated by the Chinese Exclusion Act of 1882. KANSTROOM, *supra* note 222, at 116. The law required all Chinese citizens present in the United States to register and prove their lawful presence with the affidavit of at least one credible white witness. *Id.*; *Fong Yue Ting*, 149 U.S. at 732 (noting that the statute in question required "the testimony of a credible white witness" for the issuance of a residence certificate).

228. *Fong Yue Ting*, 149 U.S. at 730. This conclusion was affirmed in the contemporaneous case of *Wong Wing v. United States*: "The order of deportation is not a punishment for a crime. . . . It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation . . . has determined that his continuing to reside here shall depend." 163 U.S. 228, 236 (1896).

229. *Fong Yue Ting*, 149 U.S. at 727.

230. See JOHNSON, *supra* note 52, at 17; Gabriel J. Chin, Chae Chan Ping and Fong Yue Ting: *The Origins of Plenary Power*, in IMMIGRATION STORIES 7–11 (David A. Martin & Peter H. Shuck eds., 2005).

231. Chin, *supra* note 230, at 7, 21 (citations omitted). As Hiroshi Motomura points out, "[i]t is noteworthy, if not striking, that the doctrine, a product of the same era as *Plessy v. Ferguson*, has faded so little with the passage of time." Motomura, *supra* note 220, at 554–55.

tation laws from searching judicial review. Because the legislative and executive branches retain broad authority to determine which noncitizens should be permitted to enter and remain in the country, noncitizens remain subject to harsh immigration consequences for committing minor criminal offenses. This is why the United States tolerates the permanent banishment of a lawful permanent resident for two marijuana possession offenses.²³²

B. Reconsidering Deportation's Classification as Nonpunishment²³³

There are many reasons to reconsider deportation's classification as a civil penalty, especially since the concept of deportation has changed in many fundamental ways in the century since the Supreme Court decided *Fong Yue Ting*. Deportation law has always been a means of regulating the admissions process by removing those who are present without authorization.²³⁴ Daniel Kanstroom calls this type of deportation "extended border control" and construes it to function as a part of the nation's sovereign power over its borders.²³⁵ But it is only more recently that deportation has also functioned as a means of "post-entry social control,"²³⁶ prohibiting immigrants from engaging in certain types of political and criminal activities after entry even when they are unaware of the multitude of conditions placed on their admission.²³⁷ The increased intermeshing of the im-

232. See, e.g., Cuellar-Gomez, 25 I. & N. Dec. 850 (B.I.A. 2012) (affirming deportation of an LPR on aggravated felony grounds for two marijuana possession offenses).

233. It is beyond the scope of this Comment to attempt a full dismantling of the plenary power doctrine, which insulates substantive immigration law policies from judicial review. For more searching examinations and critiques of the plenary power doctrine, see, for example, Motomura, *supra* note 220, at 549 (exploring how the plenary power doctrine has been undermined by statutory interpretation following "phantom constitutional norms"); Natsu Taylor Saito, *The Plenary Power Doctrine: Subverting Human Rights in the Name of Sovereignty*, 51 CATH. U. L. REV. 1115 (2002) (proposing that the plenary power doctrine must not be prioritized over compliance with international human rights law). Cf. Victor C. Romero, *On Elián and Aliens: A Political Solution to the Plenary Power Doctrine*, 4 N.Y.U. J. LEGIS. & PUB. POL'Y 343 (2001) (proposing that immigrant communities use the plenary power doctrine to their own benefit through participation in the democratic process).

234. KANSTROOM, *supra* note 222, at 5.

235. *Id.*

236. *Id.*

237. *Id.* at 6 ("There is no requirement that a noncitizen be informed of [this proscribed conduct] at entry. Indeed, [these conditions] may be changed retroactively: a noncitizen may be deported for conduct that was not a deportable offense when it occurred."). Of course, noncitizens who are present without immigration status are generally formally deported as a consequence of their unlawful presence and not because of the commission of a drug offense. See ALEINIKOFF ET AL., *supra* note 161, at 750, and accompanying text. But, as explored in Part III, these offenses often keep noncitizens from applying for humanitarian forms of relief from deportation that would otherwise be available to them.

migration and criminal enforcement systems through the rise of postentry social control legislation strongly suggests that deportation is a form of punishment and thus that noncitizens should be afforded a greater degree of constitutional protections when placed in deportation proceedings.

This is by no means a novel suggestion. In the *Fong Yue Ting* dissent, Justice Brewer scoffed at the idea that deportation constitutes anything other than banishment, which is clearly punishment.²³⁸ Countless immigration law scholars have made convincing cases that deportation should be considered a form of criminal punishment.²³⁹ But three recent Supreme Court cases also suggest—in explicit and implicit terms—that our current deportation system is at least edging toward the boundaries of criminal punishment. Together, *Padilla v. Kentucky*, *Carachuri-Rosendo v. Holder*, and *Moncrieffe v. Holder* intimate that there is something deeply problematic with the nearly automatic deportation of noncitizens for minor drug offenses.²⁴⁰ And though the reasoning of these cases is focused on the aggravated felony deportation ground, their analyses also apply to the application of deportation and inadmissibility grounds to noncitizens who have committed minor marijuana offenses.

1. *Padilla v. Kentucky*

Of the three cases mentioned here, *Padilla v. Kentucky* arguably goes the furthest in its description of deportation as criminal punishment.²⁴¹ The opinion does not go so far as to hold that deportation is a direct consequence of a crime—

238. *Fong Yue Ting*, 149 U.S. at 740 (Brewer, J., dissenting) (“Deportation is punishment. It involves first an arrest, a deprivation of liberty, and, second, a removal from home, from family, from business, from property.”). There is a strong argument that Justice Brewer’s reasoning might only apply to permanent residents as he makes a point of distinguishing between the rights of those who have made this country their permanent home and those who are “simply passing through.” *Id.* at 734.

239. See, e.g., Banks, *supra* note 212; Daniel Kanstroom, *Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases*, 113 HARV. L. REV. 1890, 1892 (2000) (arguing that the growing overlap between the worlds of criminal justice and deportation means that the “constitutional norms applicable to criminal cases should inform our approach to deportation far more specifically than they have in the past”); Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution’s Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305 (2000); Wishnie, *supra* note 210.

240. See *supra* note 217 and accompanying text.

241. See Ana Ortiz Maddali, *Padilla v. Kentucky: A New Chapter in Supreme Court Jurisprudence on Whether Deportation Constitutes Punishment for Lawful Permanent Residents?*, 61 AM. U. L. REV. 1 (2011). Professor Ortiz Maddali argues that three factors in *Padilla* indicate that deportation is a direct consequence of a criminal plea, as the case discusses the “automatic nature of deportation,” how “noncitizen criminal defendants cannot separate the penalty of deportation from the conviction,” and how “deportation has become largely enmeshed with the criminal conviction.” *Id.* at 26 (citations omitted).

such a holding would have expanded to defendants in immigration cases the full protections afforded defendants in criminal proceedings. But the majority opinion emphasizes that deportation is at least partially crime-based, noting: “[B]ecause of its close connection to the criminal process[, deportation is] . . . uniquely difficult to classify as either a direct or collateral consequence.”²⁴² Justice Stevens, writing for the majority, gives a brief overview of the increasing number of crime-related deportability grounds incorporated in the INA²⁴³ and the almost-mandatory nature of most crime-related deportability after the elimination of two broad mechanisms for discretionary relief from removal.²⁴⁴ Before 1990, under a procedure known as Judicial Recommendation Against Deportation (JRAD), the sentencing judge in criminal court could make a binding recommendation that the noncitizen criminal defendant be spared from deportation.²⁴⁵ Congress eliminated JRAD in 1990.²⁴⁶ Then, just six years later, Congress also eliminated a type of relief from removal known as 212(c) relief, which allowed the Attorney General to grant discretionary relief from deportation to noncitizens with criminal convictions.²⁴⁷ Justice Stevens notes that “[t]hese changes confirm our view that . . . 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.”²⁴⁸ The absence of these previously existing protections, in part, is what led the Court to hold that guidance regarding the immigration consequences of a criminal charge “is not categorically removed from the ambit of the Sixth Amendment right to counsel.”²⁴⁹

In *Padilla*, the respondent pled to a drug trafficking charge, which meant he would face removal predicated on an aggravated felony.²⁵⁰ The aggravated felony removal grounds operate in a particularly harsh manner as compared to other

242. *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010).

243. *Id.* at 362 (citing *Janvier v. U.S.*, 793 F.2d 449 (2d Cir. 1986)) (noting that the “steady expansion of deportable offenses” led the Second Circuit to hold that the Sixth Amendment applied to requests for judicial recommendation against deportation, known as JRADs, which permitted judges to decide whether a conviction would result in deportation).

244. *Id.*

245. *Id.* at 361. See generally Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131 (2002) (arguing that the deportation system should return to employing a modified version of JRAD because of the potential increase in efficiency).

246. The Immigration Act of 1990, Pub. L. No. 101-649, § 505(a) (2006).

247. *Padilla*, 559 U.S. at 362 (describing how Congress eliminated the Attorney General’s ability to grant discretionary relief from deportation under 212(c) of the INA). Section 212(c) relief remains available only to noncitizens whose convictions were obtained through guilty plea and predate the changes to the law. *I.N.S. v. St. Cyr*, 533 U.S. 289, 326 (2001).

248. *Padilla*, 559 U.S. at 362.

249. *Id.* at 366.

250. *Id.* at 362.

grounds of removability under the INA: Noncitizens who have committed aggravated felonies are ineligible for virtually all types of relief from removal,²⁵¹ and those who are not lawful permanent residents are subject to expedited removal without even having the chance to see an immigration judge.²⁵² Thus, *Padilla's* rhetoric about the “close connection” between the criminal and removal processes could be construed as particularly addressing situations where a noncitizen has been charged with an aggravated felony and thus has extremely limited options for relief from removal.

A closer look at how the controlled substance deportability and inadmissibility grounds work in practice, however, reveals that even minor marijuana offenses can result in a similar type of nearly-automatic removal, even when the offense falls outside of the aggravated felony category. There are limited exceptions available for both the deportability and inadmissibility grounds relating to controlled substance offenses.²⁵³ But, as explored in Part II, these provisions often operate so narrowly as to exclude a large group of noncitizens with very minor marijuana-related criminal histories. Individuals with more than one offense on their record, or those who have committed an offense that is considered to be more serious than simple possession, are ineligible for either type of relief.²⁵⁴ Though a noncitizen with more than one marijuana-related offense on her record would still be eligible for several important categories of relief for which an aggravated felon would be presumptively ineligible, she would remain ineligible for most types of relief that explicitly consider the balance of equities in a noncitizen's circumstances and her ties to the United States, like cancellation of removal²⁵⁵ or adjustment of status.²⁵⁶

251. See *supra* note 141 and accompanying text for a description of the consequences of an aggravated felony conviction.

252. Non-LPRs who have committed aggravated felonies are subject to administrative removal under INA § 238(b). 8 U.S.C. § 1228(b) (2006).

253. INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i) (2006) (laying out the personal use exception to the controlled substance deportability ground); INA § 212(h), 8 U.S.C. § 1182(h) (2006) (making a 212(h) waiver of inadmissibility available for one controlled substance offense related to simple possession of 30 grams or less of marijuana).

254. See, e.g., *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 565 (2010) (noncitizen with two controlled substance offense convictions is deportable); *Popescu-Mateffy v. Holder*, 678 F.3d 612, 617 (8th Cir. 2012) (conviction for possession of marijuana within a motor vehicle cannot be waived under 212(h)).

255. See *Barma v. Holder*, 640 F.3d 749, 750 (7th Cir. 2011) (noting that individuals are ineligible for cancellation of removal if they have been convicted of an offense listed under 8 U.S.C. § 1182(a)(2), which includes the controlled substance ground of inadmissibility).

256. Individuals who seek to readjust to permanent resident status as a form of defense from removal must be admissible. INA § 212(a)(2) makes an individual who has committed a controlled substance offense inadmissible, absent a 212(h) waiver, which would not be available to an

Additionally, while recognizing the severity of the aggravated felony ground, the *Padilla* majority characterizes Padilla's deportation under the controlled substance deportability ground as "presumptively mandatory."²⁵⁷ This suggests that *Padilla's* construal of nearly-automatic deportation provisions on aggravated felony grounds as punishment could extend to nonaggravated felony removal grounds as well, especially in the context of deportation on controlled substance grounds.

2. *Carachuri-Rosendo v. Holder*

Just two months after deciding *Padilla*, the Supreme Court considered the case of Jose Angel Carachuri-Rosendo, who also faced deportation based on a drug charge. Carachuri-Rosendo became a lawful permanent resident of the United States in 1993, when he was five years old.²⁵⁸ As an adult, he was convicted of a state misdemeanor drug offense in Texas for possession of one tablet of Xanax without a prescription, and he served ten days in jail.²⁵⁹ Because he had a prior conviction for possession of less than 2 ounces of marijuana,²⁶⁰ the government initiated removal proceedings against him on drug trafficking aggravated felony grounds.²⁶¹ The prior simple possession offense meant that had Carachuri-Rosendo been prosecuted in federal court, the Xanax charge could have been brought as a recidivist felony charge punishable by up to two years imprisonment.²⁶² Thus, even though the state did not charge him as a recidivist felon and he was only convicted of a misdemeanor, because a prosecutor could have charged him as a recidivist felon, the government reasoned that his second offense was an aggravated felony and required his mandatory removal.²⁶³

Luckily for Carachuri-Rosendo, the Supreme Court disagreed with government's use of this hypothetical prosecution approach. In a unanimous opinion written by Justice Stevens, the court held that a second simple possession offense must be actually based on the fact of a prior conviction in order to be considered an aggravated felony under the INA.²⁶⁴ Thus, Carachuri-Rosendo could be deemed to have committed an aggravated felony only if his state conviction been

individual who had more than one marijuana-related offense on her record. INA § 212(a)(2), 8 U.S.C. § 1182(a)(2) (2006).

257. *Padilla*, 559 U.S. at 368.

258. *Carachuri-Rosendo*, 560 U.S. at 565.

259. *Id.* at 570.

260. *Id.* at 565.

261. *Id.* at 568.

262. *Id.*

263. *Id.*

264. *Id.* at 580.

enhanced or based on the existence of a previous conviction. Because his second conviction was not based on a finding of recidivism, he could not be deemed to have committed an aggravated felony for immigration law purposes.

The opinion does not describe deportation as punishment or quasi-punishment in the same way that *Padilla* does. But it is hard to avoid the Court's incredulousness at the government's efforts to automatically deport a longtime lawful permanent resident based on such minor offenses. Justice Ginsburg expressed her skepticism particularly forcefully during oral argument. After noting that Carachuri-Rosendo's offenses included only a minor marijuana possession offense and possession of a pill that she had "never heard of," Justice Ginsburg comments on the absurdity of the government's construction of the statute:

If you could just present this scenario to an intelligent person who didn't go to law school, that you are not only going to remove him from the country, but say "Never, ever darken our doors again" because of one marijuana cigarette and one Xan-something pill—it, it just seems to me that if there is a way of reading the statute that would not lead that absurd result, you would want to read the statute [that way]. . . .²⁶⁵

The majority opinion itself lays out the facts in a way that expresses sympathy for Carachuri-Rosendo's situation. "Like so many in this country," Justice Stevens writes, "Carachuri-Rosendo has gotten into some trouble with our drug laws."²⁶⁶ Justice Stevens highlights Carachuri-Rosendo's long residence in the United States, and his extensive family ties to this country.²⁶⁷ The opinion employs many phrases that express the Court's skepticism with the government's attempted expansion of the aggravated felony removal grounds to cover noncitizens in Carachuri-Rosendo's situation, stating that it is "unorthodox to classify this type of petty simple possession recidivism as an 'aggravated felony,'"²⁶⁸ warning that the Court should be "doubly wary of the Government's position in this case,"²⁶⁹ and calling the government's approach "a hypothetical to a hypothetical."²⁷⁰

Daniel Kanstroom describes this case as a compelling instance of the Court rejecting the imposition of a severely disproportionate immigration consequence

265. Oral Argument at 35:20-36:2, *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010) (No. 09-60), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-60.pdf.

266. *Carachuri-Rosendo*, 560 U.S. at 570.

267. *Id.* (noting that Carachuri-Rosendo has resided in the United States since the age of five, and that his common-law wife, four children, mother, and two sisters are all U.S. citizens).

268. *Id.* at 574.

269. *Id.*

270. *Id.* at 580 (citing *Rashid v. Mukasey*, 531 F.3d 438, 455 (6th Cir. 2008)).

to a criminal offense.²⁷¹ This rejection should not be over-read, however, as the Court was clear that Mr. Carachuri-Rosendo remained deportable, just not on aggravated felony grounds.²⁷² For all practical purposes, though, deportation on controlled substance grounds can be just as disproportionate and unduly harsh as deportation on aggravated felony grounds. The *Carachuri-Rosendo* decision indicates that the Court may at least be open to considering the harsh operation of other drug-related removal grounds in the future.

3. *Moncrieffe v. Holder*

In the Supreme Court's most recent decision addressing the aggravated felony removal ground, *Moncrieffe v. Holder*, the Court overturned precedent in three different circuits that had considered a misdemeanor conviction for social distribution of small amounts of marijuana to be an aggravated felony for immigration purposes.²⁷³ Adrian Moncrieffe, a lawful permanent resident from Jamaica,²⁷⁴ was found with 1.3 grams of marijuana in his car during a routine traffic stop.²⁷⁵ He was charged with possession of marijuana with intent to distribute.²⁷⁶ Moncrieffe agreed to plead guilty to the charge in exchange for a deferred judgment that would expunge his record after the successful completion of five years of probation.²⁷⁷ The government then commenced removal proceedings against Moncrieffe, construing his conviction as an aggravated felony because it is an offense that could have been punished as a felony under the Controlled Substance Act if the charges had been brought in federal court.²⁷⁸

271. KANSTROOM, *supra* note 17, at 110.

272. *Carachuri-Rosendo*, 560 U.S. at 581 (“[T]o the extent that our rejection of the Government’s broad understanding of the scope of ‘aggravated felony’ may have any practical effect on policing our Nation’s borders, it is a limited one. Carachuri-Rosendo . . . may now seek cancellation of removal But he will not avoid the fact that his conviction makes him, in the first instance, removable.”).

273. 133 S. Ct. 1678 (2013). See *supra* note 141 and accompanying text for the definition of an aggravated felony and ALEINIKOFF ET AL., *supra* note 161, for the immigration consequences of aggravated felonies.

274. Mr. Moncrieffe had resided lawfully in the United States since the age of three. He worked as a home health aide, and had five U.S. citizen children. Nina Totenberg, *Justices Say U.S. Improperly Deported Man Over Marijuana*, NPR (Apr. 23, 2013, 5:25 PM), <http://www.npr.org/2013/04/23/178651009/justices-say-u-s-improperly-deported-man-over-marijuana>.

275. *Moncrieffe*, 133 S. Ct. at 1683. As the court notes, 1.3 grams of marijuana “is the equivalent of about two or three marijuana cigarettes.” *Id.*

276. *Id.*; see GA. CODE ANN. § 16-13-30(j)(1) (2011).

277. *Moncrieffe*, 133 S. Ct. at 1683.

278. *Id.*; see 21 U.S.C. § 851(a)(2) (2006). The Georgia statute in question punished Mr. Moncrieffe’s conduct as a felony punishable by between one and ten years incarceration. GA. CODE ANN. § 16-13-30(j)(2) (2011).

The Supreme Court rejected the government's interpretation of the interaction of the Georgia statute with the Controlled Substance Act. Though Moncrieffe's offense could have been prosecuted as a felony in federal court, it also could have been charged as a misdemeanor.²⁷⁹ The Court rejected the government's attempted expansion of the aggravated felony removal ground in this situation, holding: "If a noncitizen's conviction for a marijuana distribution offense fails to establish that the offense involved either remuneration or more than a small amount of marijuana, the conviction is not for an aggravated felony under the INA."²⁸⁰

As scholar Mark Noferi points out, the *Moncrieffe* oral argument did not include explicit discussions of proportionality,²⁸¹ and, like the *Carachuri-Rosendo* opinion, the majority makes clear that Moncrieffe is still removable on controlled substance grounds.²⁸² Yet proportionality concerns invariably lurk in the background of the opinion. The Court's characterization of the facts highlights the minor nature of the offense compared to Mr. Moncrieffe's long residence in the United States, noting that he had resided lawfully in the United States since he was three years old and was caught in a traffic stop with only "the equivalent of about two or three marijuana cigarettes."²⁸³ Justice Sotomayor also hints at the Court's frustration with the government's repeated attempts to expand the aggravated felony deportation ground to cover nonserious controlled substance violations. She writes:

This is the third time in seven years that we have considered whether the Government has properly characterized a low-level drug offense as "illicit trafficking in a controlled substance," and thus an "aggravated felony." Once again we hold that the Govern-

279. *Moncrieffe*, 133 S. Ct. at 1686–87.

280. *Id.* at 1693–94.

281. Mark Noferi, *Moncrieffe: Whither Proportionality and the Constitution*, CRIMMIGRATION (Oct. 12, 2012, 9:02 AM), <http://crimmigration.com/2012/10/12/symposium-moncrieffe-whither-proportionality-the-constitution>.

282. *Moncrieffe*, 133 S. Ct. at 1692. As Justice Sotomayor noted in her majority opinion, "[e]scaping aggravated felony treatment does not mean escaping deportation, though. It only means avoiding mandatory removal." *Id.*

283. *Id.* at 1683. This contrasts sharply with the characterization of the offense in both dissents. Justice Thomas states flatly that "Moncrieffe's offense of possession of marijuana with intent to distribute satisfies both elements [of an aggravated felony]." *Id.* at 1694 (Thomas, J., dissenting). Justice Alito focuses on the risk that those engaged in "[l]arge-scale marijuana distribution" will now be spared from deportation, failing to mention that Mr. Moncrieffe's possession of 1.3 grams of marijuana by no means even comes close to such activity. *Id.* at 1696 (Alito, J., dissenting).

ment's approach defies "the 'commonsense conception'" of these terms.²⁸⁴

This implicit criticism of the government's aggressive attempts to expand the number of crimes that are aggravated felonies reflects the Supreme Court's concern with proportionality, even if the concern is not explicitly stated as such.²⁸⁵ And, as we have seen, many noncitizens who commit minor marijuana offenses that are not aggravated felonies will still be subject to removal because of these offenses.²⁸⁶ Though this is not the exact type of mandatory removal that the Court seems to criticize in *Moncrieffe*, these removals will, in practice, operate in a similarly unjust and disproportionate fashion.²⁸⁷ Thus, there is reason to think that the Court's implicit proportionality concerns could be extended to nonaggravated felony removals that were provoked by minor marijuana offenses.

Padilla's characterization of deportation as a part of the criminal penalty, combined with *Carachuri-Rosendo's* and *Moncrieffe's* underlying proportionality concerns, indicates that there is reason to think that a proportionality analysis could be applied to the immigration consequences of low-level marijuana offenses. Recognizing deportation as a type of criminal punishment would open the jurisprudence up to more explicit considerations of proportionality in deportation and would necessarily lead to a reconsideration of the harsh immigration consequences of low-level marijuana offenses. Immigration law remains one of the only legal doctrines that almost completely eschews proportionality, as deportation tends to be the consequence for all violations.²⁸⁸ As marijuana offenses remain pseudo-decriminalized in many parts of the country, and likely will be pseudo-decriminalized in more places, more and more noncitizens will be put at risk of deportation from these minor offenses. Thus, the need to reconsider immigration law's lone isolation from proportionality review is likely to become more and more pressing.

284. *Id.* at 1693. The two other cases are *Carachuri-Rosendo v. Holder* and *Lopez v. Gonzales*. *Lopez* held that a crime punishable as a felony under state law but that is only a misdemeanor under the Controlled Substances Act cannot be considered an illicit trafficking aggravated felony. *Lopez v. Gonzales*, 549 U.S. 47, 50 (2006).

285. Reyes, *supra* note 217 (noting that "the Court's admonishment to the Government to stop treating minor drug offenses as aggravated felonies implicitly addressed proportionality, even if the case was decided on the basis of statutory interpretation").

286. See Part II for a discussion of the inadmissibility and removal grounds implicated by nonserious marijuana offenses.

287. *Moncrieffe* has already been deported to Jamaica, and thus now must ask permission to return to the United States by seeking discretionary relief from removal. Totenberg, *supra* note 274.

288. Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1684 (2009).

V. PROPOSED SOLUTIONS

In light of the constitutional and justice issues raised by this intersection of the pseudo-decriminalization of marijuana on the one hand and immigration laws on the other, how can we move forward? It is crucial that immigrant rights advocates and policymakers take this issue seriously, especially in light of the continuing trend toward pseudo-decriminalization of marijuana and the potential for comprehensive immigration reform. On June 6, 2013, Vermont became the seventeenth state to remove criminal penalties for personal possession of small amounts of marijuana,²⁸⁹ and as public opinion shifts toward legalization, it will likely not be the last to do so.²⁹⁰ At the same time, efforts for comprehensive immigration reform remain active, in spite of significant setbacks in Congress.²⁹¹ An immigration reform bill passed by the U.S. Senate in the summer of 2013 proposed granting a ten-year provisional immigration status to undocumented individuals before they would qualify for lawful permanent residence.²⁹² Noncitizens would be ineligible for this provisional status in the first place if they are inadmissible under INA section 212(a) criminal grounds, which includes the controlled substance ground of inadmissibility.²⁹³ Additionally, those granted this provisional status would be in danger of becoming ineligible for a more permanent status later on if they picked up a civil marijuana infraction.

289. David Knowles, *Vermont Becomes 17th State to Decriminalize Marijuana, Making Possession of Less Than an Ounce of Pot Punishable by Fine*, N.Y. DAILY NEWS (June 6, 2013), <http://www.nydailynews.com/news/national/vermont-decriminalizes-possession-small-amounts-pot-article-1.1365354>.

290. Recent polls suggest that public support of marijuana legalization has never been higher. A Pew Research Center poll found that 52 percent of Americans support legalization, which is a jump of 7 percentage points in the past two years. Scott Clement, *Legalize It, Poll Shows*, WASH. POST, Apr. 4, 2013, <http://www.washingtonpost.com/blogs/the-fix/wp/2013/04/04/legalize-it-poll-shows>.

291. See, e.g., Esther Yu-Hsi Lee, *How Nancy Pelosi May Turn Up the Heat on Immigration Reform Opponents*, THINKPROGRESS (Mar. 6, 2014, 9:00 AM), <http://thinkprogress.org/immigration/2014/03/06/3361781/pelosi-immigration-discharge-petition/#> (noting that House Minority Leader Nancy Pelosi may attempt a procedural move to force House Republicans to consider an immigration reform bill).

292. S. 744, 113th Cong. § 2101 (2013). Most commentators believe that any hopes for legislative immigration reform are “effectively dead,” including the 2013 Senate bill. See, e.g., David Nakamura & Ed O’Keefe, *Immigration Reform Effectively Dead Until After Obama Leaves Office, Both Sides Say*, WASH. POST, June 26, 2014, http://www.washingtonpost.com/politics/immigration-reform-deal-now-unlikely-until-after-obama-leaves-office-both-sides-say/2014/06/26/945d1210-fc96-11e3-b1f4-8e77c632c07b_story.html. But the 2013 bill is still relevant as an example of what a legislative bipartisan solution could look like.

293. S. 744, 113th Cong. § 2101 (2013) (specifying that noncitizens who are inadmissible under 212(a) will be ineligible for registered provisional immigration status). Several grounds of inadmissibility are eliminated in the current version of the bill, including public charge and unlawful presence grounds, but the criminal inadmissibility grounds remain.

What changes could be made to diminish the risk of this injustice? The best solution would likely be part of a broader overhaul of the interaction between criminal law and immigration law. Many scholars and immigrant rights advocates are pointing out problems with the system that go far beyond those caused by minor marijuana offenses.²⁹⁴ Rather than proposing a more comprehensive reexamination of our immigration system, though, this Part briefly proposes some reforms that could remedy the particular issues arising from the deportability and inadmissibility grounds implicated by low-level marijuana offenses. Some of these proposals require reform at the national level, while others could be implemented more locally.

A. Legalize Marijuana at the Federal Level

Marijuana activists have been seeking legalization at the federal level for years, with little success.²⁹⁵ Recently, however, the prospects for national legalization have become slightly more hopeful. In a January 2014 interview, President Obama portrayed marijuana use as a “bad habit and a vice, not very different from . . . cigarettes,” and spoke favorably of legalization efforts in Colorado and Washington State.²⁹⁶ These comments, along with continued moves toward legalization at the state level across the country, have fostered a new push on the federal government to legalize the drug.²⁹⁷

Legalization of marijuana at the federal level would solve many of the problems raised in this Comment without entering into the contentious task of reforming the immigration laws themselves. As written, the controlled substance inadmissibility and deportability grounds cross-reference the federal Controlled

294. See, e.g., KANSTROOM, *supra* note 222, at 245 (proposing the use of a quasi-criminal model in deportation proceedings that would ensure noncitizens received certain crucial rights without making the proceedings entirely criminal); Melissa Cook, *Banished for Minor Crimes: The Aggravated Felony Provision of the Immigration and Nationality Act as a Human Rights Violation*, 23 B.C. THIRD WORLD L.J. 293 (2003) (arguing that the application of the aggravated felony removal ground in the cases of minor crimes violates international human rights laws).

295. See, e.g., Michael Vitiello, *Proposition 215: De Facto Legalization of Pot and the Shortcomings of Direct Democracy*, 31 U. MICH. J.L. REFORM 707, 752–55 (1998) (describing failed efforts by the National Organization for the Reform of Marijuana Laws to legalize marijuana at the federal level from the 1970s to the mid-1990s).

296. David Remnick, *Going the Distance*, NEW YORKER, Jan. 27, 2014, at 41, 52 (quoting President Obama as saying, in regards to the recent state legalizations, that “it’s important for it to go forward because it’s important for society not to have a situation in which a large portion of people have at one time or another broken the law and only a select few get punished.”).

297. See, e.g., Letter From Rep. Earl Blumenauer et al., to President Barack Obama (Feb. 12, 2014) [hereinafter Blumenauer Letter], available at <http://blumenauer.house.gov/images/stories/2014/02-12-14%20Blumenauer%20Rescheduling%20Letter.pdf> (urging President Obama to consider marijuana legalization efforts, on behalf of eighteen members of Congress).

Substance Act.²⁹⁸ If marijuana were no longer listed as a controlled substance, then marijuana offenses would no longer subject noncitizens to immigration consequences related to controlled substance violations.

Nothing short of legalization, however, would achieve justice for immigrants in this area. Some legalization advocates have pressed Obama to take executive action and reclassify marijuana as a non-Schedule I controlled substance as a first step toward legalization.²⁹⁹ But immigration law defines a controlled substance as any substance listed in the five schedules maintained by the Drug Enforcement Administration (DEA).³⁰⁰ That means that even if marijuana were reclassified as a Schedule IV controlled substance, which includes drugs that the DEA considers to have a low potential for abuse or dependence,³⁰¹ it would still subject a noncitizen to immigration consequences.

The day for full federal legalization may not be that far off. Eighteen members of Congress recently urged President Obama to take steps toward decriminalizing marijuana,³⁰² and for the first time in history, the majority of Americans support marijuana legalization.³⁰³ Legalization would make a huge difference not only in our criminal justice system but also for many noncitizens fighting to remain in this country.

B. Amend the INA to Eliminate the Application of the Controlled Substance Inadmissibility and Deportability Grounds to Offenses Involving Marijuana

The INA, which lays out the laws governing the admission and deportation of noncitizens, is subject to amendment by Congress.³⁰⁴ Since the controlled

298. Controlled Substances Act of 1970, Pub. L. No. 91-513, Title II, § 101, 84 Stat. 1236, 1242 (1970) (codified as amended at 21 U.S.C. §§ 801–971 (2006)).

299. See, e.g., Melanie Hunter, *Obama Won't Take Executive Action to Remove Pot From Narcotics List*, CNS NEWS (Jan. 31, 2014), <http://cnsnews.com/news/article/melanie-hunter/obama-wont-take-executive-action-remove-pot-narcotics-list>. President Obama maintains that any change to the DEA's schedules would have to be enacted by Congress. *Id.*

300. 21 U.S.C. § 802(6) (2012) (defining a controlled substance as a drug included in schedules I, II, III, IV, or V of the chapter). The controlled substance inadmissibility and deportability grounds both reference this definition. 8 U.S.C. § 1182(a)(2)(A)(i) (2012); 8 U.S.C. § 1227(a)(2)(B)(i) (2012).

301. See *Drug Schedules*, U.S. DRUG ENFORCEMENT ADMIN., <http://www.justice.gov/dea/druginfo/ds.shtml> (last visited July 25, 2014).

302. Blumenauer Letter, *supra* note 297.

303. Halimah Abdullah, *Up in Smoke: The Obama Administration's Pot Politics Problem*, CNN POLITICS (Feb. 5, 2014, 9:00 AM), <http://www.cnn.com/2014/02/04/politics/pot-politics> (noting that 55 percent of Americans now support marijuana legalization, while only 16 percent did twenty-five years ago).

304. The INA has been amended multiple times, both to create sweeping changes to our immigration system and to make small changes in provisions and benefits granted to certain groups. See, e.g.,

substance grounds of inadmissibility and deportability already each contain an exception for a single offense involving less than 30 grams of marijuana,³⁰⁵ it is not impossible to think that the exceptions could be broadened to eliminate all marijuana-related offenses from the controlled substance provisions. As there are separate inadmissibility and removability grounds for drug trafficking offenses,³⁰⁶ this change would likely still exclude and deport noncitizens involved in serious drug trafficking activity.³⁰⁷

An amendment like this would likely face significant barriers to passage in Congress, especially considering political fear of so-called “criminal immigrants.”³⁰⁸ But immigration laws have been changed previously in response to evolving societal views about certain types of behavior. Homosexuality was a ground of inadmissibility³⁰⁹ until passage of the Immigration Act of 1990.³¹⁰ This Act, while eliminating homosexuality as a ground of prejudicial exclusion, simultaneously added AIDS and HIV-positive status as grounds of inadmissibility.³¹¹ It was not until 2008 that Congress removed the HIV inadmissibility

Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54; Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875; Immigration Reform and Control Act of 1986, Pub. L. 99-603, 100 Stat. 3359.

305. INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i) (2006) (one-time personal use exception for deportability); INA § 212(h), 8 U.S.C. § 1182(h) (2006) (availability of an inadmissibility waiver for one simple possession offense involving less than 30 grams of marijuana).
306. Illicit trafficking in a controlled substance is considered to be an aggravated felony for immigration purposes. INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B) (2006).
307. The drug trafficking aggravated felony ground can also be applied to second drug possession offenses that involve a recidivist finding. *See* Carachuri-Rosendo v. Holder, 560 U.S. 563 (2010); Cuellar-Gomez, 25 I. & N. Dec. 850 (B.I.A. 2012). So this proposed change may still leave some noncitizens at risk of deportation based on simple marijuana possession offenses alone, depending on how the INA grounds were revised.
308. *See, e.g.,* Suzy Khimm, *Obama Is Deporting Immigrants Faster Than Bush. Republicans Don't Think That's Enough*, WASH. POST, Aug. 27, 2012, <http://www.washingtonpost.com/blogs/wonkblog/wp/2012/08/27/obama-is-deporting-more-immigrants-than-bush-republicans-dont-think-thats-enough> (noting that “[t]he administration’s stated goal is to prioritize the deportation of criminal, dangerous illegal immigrants”).
309. *Rosenberg v. Fleuti*, 374 U.S. 449, 450–51 (1963) (examining the case of a lawful permanent resident who was ordered deported on grounds that he was excludable at the time of entry as an alien “afflicted with psychopathic personality . . . by reason of the fact that he was a homosexual”) (citations omitted).
310. Immigration Act of 1990, Pub. L. No. 101-649, § 601(a), 104 Stat. 4978, 5067 (2006).
311. The Act barred entry of noncitizens with communicable diseases “of public health significance.” INA § 212(a)(1)(A)(i), 8 U.S.C. § 1182(a)(1)(A)(i) (2006). Though the Department of Health and Human Services proposed that HIV be removed from the exclusion list, Congress amended the exclusion ground in 1993 to specify that HIV was considered a communicable disease of public health significance. ALEINIKOFF ET AL., *supra* note 161, at 604.

ground,³¹² due in large part to changing societal views on the stigma related to the disease.³¹³

Marijuana use differs from sexual orientation or HIV-positive status in that it is an affirmative act, which is currently considered criminal by the federal government, and not an immutable characteristic like an incurable illness or sexual orientation. But considering the rapidly growing acceptance of marijuana use and the prevalence of experimentation with marijuana among the general population, it is not out of the realm of possibility that Congress could similarly reconsider the deportation and exclusion of noncitizens who have used marijuana. Forty-eight percent of U.S. adults say they have tried marijuana at some point in their life.³¹⁴ The country's current president and one of its most conservative Supreme Court justices have both admitted to smoking marijuana.³¹⁵ The FBI has changed its hiring practices so that admission of past drug use does not lead to automatic disqualification for employment.³¹⁶ If presidents, Supreme Court justices, and FBI agents are afforded some grace regarding past drug use, perhaps our national policy can be changed to extend a similarly accepting attitude toward noncitizen residents.

C. Provide Attorneys to Noncitizens Charged With Marijuana Offenses

Both of the preceding proposals would require federal legislation on controversial topics, which means there is reason to think that either of these changes, if feasible, might occur far into the future. In the meantime, states and localities that have pseudo-decriminalized marijuana can and should take steps to protect

312. Though Congress amended the INA in 2008 to delete HIV from the list of communicable diseases of public health significance, the applicable federal regulation did not change until January 2010. ALEINIKOFF ET AL., *supra* note 161, at 604.

313. See PHILLIP NIEBURG ET AL., CENTER FOR STRATEGIC AND INTERNATIONAL STUDIES, MOVING BEYOND THE U.S. GOVERNMENT POLICY OF INADMISSIBILITY OF HIV-INFECTED NONCITIZENS 2 (2007) (“[F]rom a public health perspective, it is now understood that the external disease threat was exaggerated . . . [T]here is today broad recognition of how HIV-related stigma and discrimination can undermine HIV prevention and control efforts.”).

314. *Marijuana Use Increased Over the Last Decade*, PEW RESEARCH CENTER (Apr. 17, 2013), <http://www.pewresearch.org/daily-number/marijuana-use-increased-over-the-last-decade>.

315. See Stephen Labaton, *Thomas Smoked Marijuana But Retains Bush Support*, N.Y. TIMES, July 11, 1991, <http://www.nytimes.com/1991/07/11/us/thomas-smoked-marijuana-but-retains-bush-support.html?module=Search&mabReward=relbias%3Ar>; Katharine Q. Seelye, *Barack Obama, Asked About Drug History, Admits He Inhaled*, N.Y. TIMES, Oct. 24, 2006, <http://www.nytimes.com/2006/10/24/world/americas/24iht-dems.3272493.html>.

316. Morawetz, *supra* note 15, at 165 n.6 (detailing changes in the Federal Bureau of Investigation's hiring procedures to no longer automatically bar those who admit to having smoked marijuana more than fifteen times in their life).

their noncitizen residents from facing marijuana charges without the assistance of counsel.

The most straightforward way of doing this would be to have judges appoint government-funded attorneys to all noncitizens charged with marijuana offenses. On a practical level, this approach would address the Sixth Amendment problems that arise when noncitizens are charged with low-level marijuana offenses but have no right to appointed counsel.³¹⁷ Even if states and localities are unable (or unwilling) to fund indigent criminal defense above the minimum required by the Constitution, *Padilla* is clear that noncitizens in criminal proceedings have a right to comprehensive advice and assistance regarding the immigration consequences of the charges against them.³¹⁸ The only way to ensure that defendants receive this advice is by appointing counsel.³¹⁹

This proposal may be challenging from a fiscal perspective, as funding for misdemeanor representation continues to be cut throughout the country.³²⁰ But reports indicate that some judges have already been taking this step by appointing counsel for noncitizens facing charges, even in purportedly anti-immigrant parts of the country.³²¹ Additionally, appointing counsel upfront is a way for overburdened state courts to save on costs that would otherwise be incurred by their appellate courts. When a noncitizen is denied his Sixth Amendment right to affirmative and correct advice on immigration consequences, the remedy is sought through postconviction relief.³²² As this denial of *Padilla* rights becomes

317. See Jason A. Cade, *Deporting the Pardoned*, 46 U.C. DAVIS L. REV. 355, 400 (2012) (suggesting that states could provide attorneys to noncitizens arrested for certain misdemeanor offenses, but then pointing out that the cost associated with this approach makes it an unlikely solution).

318. See Part II for further discussion of the *Padilla* case and its applicability to noncitizens charged with low-level marijuana offenses.

319. See NIKKI REISCH & SARA ROSELL, IMMIGRANT DEFENSE PROJECT, JUDICIAL OBLIGATIONS AFTER *PADILLA V. KENTUCKY*: THE ROLE OF JUDGES IN UPHOLDING DEFENDANTS' RIGHTS TO ADVICE ABOUT THE IMMIGRATION CONSEQUENCES OF CRIMINAL CONVICTIONS 18 (2011), available at <http://immigrantdefenseproject.org/wp-content/uploads/2011/11/postpadillaFINALNov2011.pdf>.

320. *Id.* See generally ROBERT C. BORUCHOWITZ ET AL., NAT'L ASS'N OF CRIMINAL DEFENSE LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 20–26 (2009) (describing how overloaded many public defenders are with misdemeanor caseloads and how misdemeanor representation specifically is dramatically underfunded throughout the country); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313 (2012) (examining the largely informal nature of misdemeanor processing throughout the country, in spite of the heavy collateral consequences that can result from misdemeanor convictions).

321. Borden, *supra* note 194 (noting that some judges in Prince William County will appoint a public defender for defendants subject to immigration detainers).

322. See Cuellar-Gomez, 25 I. & N. Dec. 850, 855 (B.I.A. 2012) (“If the respondent believes his Wichita conviction is unconstitutional, then his remedy is to seek postconviction relief in the Kansas courts.”).

more and more common and state courts become more and more clogged with requests for postconviction relief, states may be forced to take a more preventive approach by appointing counsel for noncitizens in all criminal proceedings that could implicate immigration consequences.

The disadvantage of this approach is that it would not resolve the underlying issues of proportionality addressed in Part IV. But broad implementation of this strategy would prevent many noncitizens from becoming deportable and inadmissible, and this would definitely be an important step toward preventing the widespread violation of noncitizens' Sixth Amendment rights in misdemeanor proceedings.

D. Exercise Prosecutorial Discretion

A more immediate but temporary fix would be for the federal government to exercise prosecutorial discretion for noncitizens present in the United States who have immigration problems because of low-level marijuana offenses. Prosecutorial discretion allows the government to decline to remove certain deportable noncitizens, usually on humanitarian grounds.³²³ Immigration law professor Hiroshi Motomura defines two types of prosecutorial discretion in the immigration context.³²⁴ "Macro-level prosecutorial discretion" involves government-wide policy decisions about where to focus immigration enforcement efforts, while "micro-level prosecutorial discretion" constitutes decisions made on individual cases.³²⁵ Both kinds of discretion could be exercised for the benefit of noncitizens facing immigration consequences for low-level marijuana offenses.

On a macro level, the government could decide to focus its enforcement efforts away from low-level drug offenders and toward a different group of noncitizens. A slightly dissimilar example of this is President Obama's decision to exercise prosecutorial discretion through the Deferred Action for Childhood Ar-

323. See generally ALEINIKOFF ET AL., *supra* note 161, at 778–88 (giving an overview of prosecutorial discretion and the various ways it has been used throughout history).

324. HIROSHI MOTOMURA, PROSECUTORIAL DISCRETION IN CONTEXT: HOW DISCRETION IS EXERCISED THROUGHOUT OUR IMMIGRATION SYSTEM 2 (2012), available at http://www.immigrationpolicy.org/sites/default/files/docs/motomura_-_discretion_in_context_04112.pdf.

325. *Id.* Micro-level prosecutorial discretion can occur in a variety of ways, including, among other techniques, declining to issue an immigration detainer, declining to file or cancelling a Notice to Appear, dismissing a removal case, granting deferred action or parole, or granting a stay of removal. See Memorandum From John Morton, Assistant Sec'y, U.S. Immigration and Customs Enforcement, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens* (June 17, 2011) [hereinafter Morton, *Prosecutorial Discretion*], available at <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>.

rivals (DACA) program, which grants a two-year deferral of deportation and a work permit to young adults who came to this country before the age of sixteen and meet certain educational and residency requirements.³²⁶ A young adult could qualify for DACA benefits even if he had committed two marijuana-related misdemeanors, as long as neither conviction resulted in a sentence of confinement of more than ninety days.³²⁷ Individuals are ineligible if they have committed a felony or a significant misdemeanor, but simple drug possession offenses are not considered to be significant misdemeanors for DACA purposes.³²⁸

The DACA program, by design, benefits only a narrow group of young people who would otherwise be at risk for deportation. Advocates could theoretically push for this kind of macro-level prosecutorial discretion as related to individuals whose criminal history only involves low-level marijuana offenses, especially when the offenses originated in jurisdictions where marijuana has been pseudo-decriminalized. This approach is already occurring on a broader level, as immigrant communities urge the Obama administration to expand the DACA program to cover all undocumented workers and their families while immigration reform remains on the table.³²⁹

Additionally, this approach is consistent with recent guidance instructing federal prosecutors to exercise macro-level prosecutorial discretion regarding low-level marijuana offenses. In August 2013, Attorney General Eric Holder issued a memo to federal prosecutors nationwide instructing them to focus prosecutorial resources on serious marijuana offenses, like those that involve distribution to minors, sales that benefit criminal gangs,

326. Deferred Action for Childhood Arrivals (DACA), allows noncitizens who were brought to the United States before the age of 16, who were under 31 on June 15, 2012, and who meet physical presence, continuous residence, and education requirements to receive a two-year deferral of deportation and work authorization. *Consideration of Deferred Action for Childhood Arrivals Process*, U.S. CITIZENSHIP & IMMIGRATION SERVICES, <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-daca> (last visited May 23, 2013).

327. Three misdemeanor offenses of any kind make an applicant ineligible for DACA benefits. *Id.*

328. *Id.* (defining a significant misdemeanor as “an offense of domestic violence; sexual abuse or exploitation; burglary, unlawful possession or use of a firearm; drug distribution or trafficking; or, driving under the influence” or a misdemeanor offense where the defendant served more than ninety days in custody).

329. See Petition for Rulemaking Submitted to the Department of Homeland Security by the National Day Laborer Organizing Network et al. (Feb. 4, 2014), available at <http://www.notonemoredeportation.com/resources/rulemaking>. There are some signs that President Obama may finally be listening to these pleas. Julie Hirschfeld Davis & Peter Baker, *After Election, Obama Vows to Work With, and Without, Congress*, N.Y. TIMES, Nov. 5, 2014, <http://www.nytimes.com/2014/11/06/us/politics/midterm-democratic-losses-grow.html> (noting the President’s promise to go forward with providing deportation relief through executive action).

and cultivation on public land.³³⁰ The memo implied that the Department of Justice should not devote resources to prosecuting low-level possession offenses, even when not prosecuted by state and local governments.³³¹ If the Department of Justice has acknowledged that it is outside of the federal government's interest to prosecute recreational pot smokers, the Department of Homeland Security should be willing to take similar steps in the realm of immigration enforcement.

Exercising micro-level prosecutorial discretion in the individual cases of noncitizens with minor marijuana offenses would be a narrower option, but one that could be quickly adopted by local ICE offices. In the interest of justice, immigration prosecutors (known as Trial Attorneys or TAs) could decline to pursue cases against noncitizens found to be inadmissible or deportable based only on minor marijuana possession offenses. This may seem like a proposal that is unlikely to be adopted, considering that TAs are institutionally situated to pursue deportation of noncitizens and not to preserve their rights. Recently, however, a group of ICE TAs in Charlotte, North Carolina agreed to administratively close proceedings against virtually all noncitizens who had been placed in deportation proceedings after being apprehended through the racial profiling tactics of the Alamance County Sheriff.³³²

Though this scenario may be an outlier, Jason Cade points out that the Charlotte TAs' actions are merely a fulfillment of "their role, as executive branch officials, to ensure that the government does not benefit from violations of the Constitution at any point in the immigration enforcement process."³³³ The Charlotte TAs sought to avoid removing those who were brought into the deportation system through violations of the Fourth Amendment and the Equal Protection Clause, and, as explored in this Comment, the cases of low-level marijuana offenders are often tainted with similarly troubling constitutional violations. Additionally, the exercise of prosecutorial

330. Memorandum from James M. Cole, Deputy Attorney General, to All United States Attorneys, Guidance Regarding Marijuana Enforcement (Aug. 29, 2013), available at <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

331. *Id.* at 2–3 (suggesting that jurisdictions that have "enacted laws legalizing marijuana in some form and that have also implemented strong and effective regulatory and enforcement systems to control" its distribution will not generally be in tension with federal prosecutorial priorities). The Brooklyn District Attorney's Office also has announced a policy of declining to prosecute most low-level marijuana offenses in their jurisdiction. Joel Rose, *Brooklyn DA Shifts Stance on Pot, But That Won't Impact NYPD*, NPR, July 12, 2014, www.npr.org/2014/07/12/330761032/brooklyn-da-shifts-stance-on-put-but-that-wont-impact-nypd.

332. Jason A. Cade, *Policing the Immigration Police: ICE Prosecutorial Discretion and the Fourth Amendment*, 113 COLUM. L. REV. SIDEBAR 180, 184 (2013).

333. *Id.* at 196.

discretion in this form would be consistent with the enforcement priorities laid out by John Morton, then-director of ICE, in June 2011.³³⁴ The Morton Memo laid out criteria for low-priority cases that ICE would choose not to pursue on humanitarian grounds, including the cases of individuals who have significant community and family ties and do not have significant criminal histories.³³⁵

Prosecutorial discretion, especially when exercised at the micro-level by individual government employees, is at best a temporary solution. Even after the Morton Memo, many noncitizens who seem to clearly fit within ICE's guidelines for low-priority enforcement still face deportation proceedings and removal throughout the country.³³⁶ But because the executive branch can propose prosecutorial discretion, thus avoiding the contentious process of Congressional approval, it also would be the fastest option for relief for many noncitizens facing deportation due to low-level marijuana offenses.

CONCLUSION

The problems that arise from the intersection of low-level marijuana offenses and our nation's immigration laws are troubling. Noncitizens routinely admit guilt for pseudo-crimes that carry minimal criminal penalties but subject them to harsh and disproportionate immigration consequences. This issue will only become more pressing as marijuana laws are continually toned down throughout the country. Finding a way to ensure that noncitizen defendants are appointed counsel and provided with complete and accurate advice regarding the immigration consequences of low-level drug offenses would be a good start to mitigating the risk of injustice. But this injustice will not be fully addressed until we take the time to carefully examine and reconsider why we deport people for an activity that is increasingly accepted by our society.

334. Morton, *Prosecutorial Discretion*, *supra* note 325.

335. *Id.* But marijuana offenses could weigh against a person's eligibility for prosecutorial discretion, considering trial attorneys are to weigh "the person's criminal history, including arrests, prior convictions, or outstanding arrest warrants" as one of the relevant factors to be considered in the prosecutorial discretion evaluation. *Id.*

336. See Melissa Crow, *Federal Judges Remind Government to Consider Prosecutorial Discretion*, IMMIGRATION IMPACT (Dec. 19, 2012), <http://immigrationimpact.com/2012/12/19/federal-judges-remind-government-to-consider-prosecutorial-discretion> (listing cases where the government has continued deportation proceedings against families with no criminal history and strong community ties to the United States in spite of the prosecutorial discretion guidelines).