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Response

Understanding Immigrant Protective Policies in Criminal Justice

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Introduction

Criminal penalties are meant to be the most severe type of state sanction.[1] Today, however, collateral consequences—state-imposed civil penalties triggered by a conviction or even an arrest—can systemically outstrip the formal criminal sentence.[2] Nowhere is this pattern more visible than in the immigration context, particularly where deportation follows from a relatively minor conviction.[3]

Too often, immigration consequences are analyzed solely from the perspective of the defense attorney or the defendant. But it would be a

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1. Francis A. Allen, *The Morality of Means: Three Problems in Criminal Sanctions*, 42 U. PITT. L. REV. 737, 738 (1981) (describing criminal law as the "heavy artillery" of society).

2. Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 810 (2015) (discussing collateral consequences stemming from arrests). A growing body of scholarship discusses the pervasiveness of collateral consequences. See generally Margaret Colgate Love, *Managing Collateral Consequences in the Sentencing Process: The Revised Sentencing Articles of the Model Penal Code*, 2015 WIS. L. REV. 247 (2015); Sandra Mayson, *Collateral Consequences and the Preventative State,* 91 NOTRE DAME L. REV. 301 (2015); Michael Pinard, *Criminal Records, Race and Redemption*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 963 (2013); Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789 (2012).

3. For a discussion of minor convictions that can trigger deportation, see Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751, 1815 (2013); Stephen Lee, *De Facto Immigration Courts*, 101 CALIF. L. REV. 553, 560–61 (2013).

mistake to assume that deportation only matters for defendants. Ingrid Eagly's insightful article, *Immigrant Protective Policies in Criminal Justice,* situates immigrant protective policies in a broader system of criminal law administration.[4] Her analysis demonstrates that immigration consequences are becoming a game-changer. The possibility of deportation alters law enforcement decisions, including the practices of prosecutors and police.[5] Awareness of collateral consequences can lead police, prosecutors, and other criminal law actors to deviate—at times, significantly—from what they would do if only the criminal law penalty were on the table. This dynamic is systemic; it is not just confined to how a particular prosecutor approaches a plea in any given case. Awareness of collateral consequences can change the way that law enforcement agencies evaluate and exercise their discretion.[6] This dynamic reflects localized, discretionary judgments in response to competing regulatory priorities.

This Response has two aims. First, Part I situates Eagly's discussion of "immigrant protective policies" in the context of recent federal efforts to regulate "sanctuary" jurisdictions. It takes as a starting point Eagly's insight that the terms "sanctuary" or "integration" do not capture how and why prosecutors and other law enforcement officials respond to collateral consequences. It argues for the need to unpack the motivations that guide law enforcement officials in responding to collateral consequences. Second, Part II considers the implications of Eagly's analysis in light of a broader blurring of the boundaries of civil and criminal law.[7] I seek to complement Eagly's study by considering its implications for other types of collateral consequences.

I. "Immigrant Protective" Policies and "Sanctuary" Jurisdictions

Scholars and advocates have long complained that rhetoric surrounding immigration enforcement is misleading. An emphasis on

4. Ingrid Eagly, *Immigrant Protective Policies in Criminal Justice*, 95 TEXAS L. REV. 245 (2016).

5. For a discussion of this dynamic in the context of plea bargaining and charging decisions, see Eisha Jain, *Prosecuting Collateral Consequences*, 104 GEO. L. J. 1197 (2016).

6. For other work in this vein, see Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement,* 88 N.Y.U. L. REV. 1126 (2013); Gabriel J. Chin, *Illegal Entry As Crime, Deportation As Punishment: Immigration Status and the Criminal Process*, 58 UCLA L. REV. 1417, 1420 (2011) ("Far from being 'separate and independent from the criminal proceeding,' deportation and other aspects of immigration status are often key considerations in the disposition of a criminal case.").

7. This is not say that immigration enforcement is not unique. Immigration law enforcement and criminal law enforcement have become intertwined to an exceptional degree. Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1354 (2010); David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157, 161 (2012). Merged criminal and immigration enforcement also creates particular potential for racial profiling. Devon W. Carbado & Cheryl I. Harris, *Undocumented Criminal Procedure*, 58 UCLA L. REV. 1543, 1573 (2011).

border enforcement, for instance, fails to acknowledge the reality that many unauthorized immigrants enter legally.[8] The terms "illegal alien" or "criminal alien" obscure the reality that immigration status is not permanent and these labels encompass quite distinct statuses.[9] Eagly's analysis suggests that the term "sanctuary" is likewise deeply misleading when applied to criminal law enforcement. The term has been employed at times to depict sanctuary cities as localities that allow "criminals to go free."[10] But as Eagly points out, immigrant protective policies in criminal justice may have little to do with a commitment to concepts such as sanctuary or immigrant integration. Rather, they are motivated by the priorities of local law enforcement agencies, including the need to combat crime effectively and forge relationships with local communities. Jail policies that limit cooperation with federal immigration detainers are also motivated in some cases by localities' desire to avoid paying for federal immigration enforcement efforts.[11] They are also affected by constitutional constraints, including the obligation not to detain anyone without probable cause.[12]

Eagly provides an important analytic framework for understanding these policies. The concerns that animate law enforcement agencies in shielding some immigrants from deportation are not necessarily public policy disagreements with deportation decisions across the board. Eagly analyzes four California counties in detail—Alameda, Los Angeles, Santa Clara, and Ventura—that are "perceived as having at least some criminal justice policies that protect immigrants."[13] They are also all located in one of the most immigrant-friendly states in the United States.[14] Prosecutors in each of these counties selectively recognize immigration and other collateral consequences as a punishment. In taking this approach,

8. David A. Martin, *Eight Myths About Immigration Enforcement*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 525, 543–44 (2007) (noting the difficulty of effective border enforcement, given 88,000 miles of tidal shoreline, the possibility of unlawful entry along the Canadian border, and the presence of a large unauthorized population who entered legally but overstayed a visa).

9. *See, e.g.*, Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement,* 88 N.Y.U. L. REV. 1126, 1136–37 (2013) ("For some time now, American thinking about immigration has articulated a sharp distinction between 'lawful immigrants' and so-called 'illegal aliens.'" On the ground, however, the practical meaning of the line between lawful and unlawful status in immigration law is far less clear.").

10. Jasmine C. Lee, Rudy Omri & Julia Preston, *What Are Sanctuary Cities?*, N.Y. TIMES (Sept. 3, 2016), http://www.nytimes.com/interactive/2016/09/02/us/sanctuary-cities.html [https://perma.cc/7KZG-YE2J]. The term "sanctuary" was widely used in the 1980s by "churches, charities, city councils, refugee services organizations and others," who challenged U.S. immigration policy and sought resettlement for undocumented immigrants fleeing from El Salvador and Central America. Eisha Jain, *Immigration Enforcement and Harboring Doctrine*, 24 GEO. IMMIGR. L.J. 147, 171–72 (2010).

11. Eagly, *supra* note 4, at 293–94.

12. Jain, *supra* note 2, n.124 (discussing lawsuits involving unconstitutional over-detentions).

13. Eagly, *supra* note 4, at 249.

14. *Id.*

prosecutors look past the formal doctrinal categories of "civil" or "criminal." They recognize that the penalties that matter during plea negotiations are those that matter the most to the defendant.

As Eagly makes clear, the existence of "immigrant protective" policies does not mean that immigrants facing deportation will necessarily receive immigration-safe pleas. For one, the examined policies only apply for minor criminal offenses. As Eagly writes, "all four policies acknowledge that collateral consequences generally will not alter the resolution of the most serious criminal cases."[15] In addition, the policies allow significant room for discretion. Perhaps because collateral consequences are so ubiquitous, prosecutors appear to establish a relatively high bar for when they take an immigrant protective approach.

Consider how each of the four offices recognizes proportionality concerns. Each office recognizes that adverse collateral consequences are generally "appropriate" or "just," and that prosecutors should only deviate from what they view as the routine processing of criminal cases in unusual or compelling circumstances.[16] Thus, the baseline position is that deportation or another collateral consequence is appropriate; line prosecutors need to have some reason, separate and apart from the fact of deportation, to deviate from their standard practice. The Los Angeles policy, for instance, permits prosecutors to deviate "from normal . . . settlement policy. . . only in 'unusual or extraordinary circumstances.'"[17] Ventura County likewise states: "Collateral consequences are generally a normal and just consequence of a criminal conviction."[18] Ventura County applies what amounts to a gross disproportionality test—requiring that the civil consequence be "so disproportionate to the severity of the crime and to the criminal punishment" that its application would be unjust—before a prosecutor may take immigration status into account.[19] The offices also apply different rules when determining if the collateral consequence is disproportionate. Some offices, like Ventura, look at both the charged conduct and the criminal penalty, while Santa Clara looks at whether the collateral impact is "significantly greater" than the criminal penalty.[20]

The policies indicate that even in "immigrant protective" jurisdictions, defendants are by no means guaranteed "immigration safe" pleas. Defendants may also not be aware of collateral consequences at the time of

15. *Id.* at 269.

16. *Id.* 268–69.

17. *Id.* at 269 (quoting Special Directive 03-04 from Steve Cooley, L.A. Cty. Dist. Attorney, to All Deputy Dist. Attorneys (Sept. 25, 2003)).

18. *Id.* (quoting OFFICE OF THE DIST. ATTORNEY, CTY. OF VENTURA, LEGAL POLICIES MANUAL § 4.01(A)(1) (Dec. 31, 2014)).

19. *Id.*

20. *Id.* (quoting Memorandum from Jess Rosen, Santa Clara Cty. Dist. Attorney, to Fellow Prosecutors 2 (Sept. 14, 2011)).

the plea agreement.[21] Thus, prosecutors may assume that civil penalties are appropriate even when defendants lacked important information about the consequences of a guilty plea.

II. Collateral Consequences and the Civil-Criminal Divide

Immigrant protective policies have important implications beyond the context of deportation. In *Padilla v. Kentucky*,[22] the Supreme Court for the first time characterized deportation as "enmeshed" with the criminal justice system and held that defendants were entitled to advice about certain immigration consequences before pleading guilty.[23] This raises the question of whether a similar approach should be taken in other contexts, such as pension loss or civil confinement.[24] In practice, a number of collateral consequences can matter far more to defendants than criminal penalties.[25] As Jenny Roberts has argued, rather than adopting a bright-line distinction between criminal and civil consequences, a better approach is to ask whether "a reasonable person in the defendant's situation would deem knowledge of the consequence, penal or otherwise, to be a significant factor in deciding whether to plead guilty."[26]

Collateral consequences can expand the impact of law enforcement discretion. Prosecutors establish their own rules for when and how they recognize collateral consequences. As Eagly writes, prosecutorial recognition of collateral consequences may be necessary for a "legitimate system of criminal punishment" that treats "each person with dignity and respect."[27] Yet there is an important difference between the prosecutor who *chooses* to recognize collateral consequences as punishment and the

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21. Defendants, for instance, might not be aware of collateral consequences other than deportation, or they might not be informed that deportation is possible but not mandatory. For an influential discussion of the role of defense attorneys in advising about collateral consequences, see Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 699 (2002) (arguing for a duty to warn).

22. 559 U.S. 356 (2010).

23. *Id.* at 365.

24. Courts vary on whether *Padilla* applies to other contexts. *Compare* People v. Hughes, 983 N.E.2d 439, 457–59 (Ill. 2012) (holding that defense counsel's failure to warn about civil confinement following conviction was sufficient to invalidate plea) with State v. Trotter, 330 P.3d 1267, 1271 (Utah 2014) (declining to extend *Padilla* to civil confinement); State v. LeMere, 879 N.W.2d 580, 588 (Wis. 2016) (holding "that the Sixth Amendment does not *require* counsel to advise defendants regarding the possibility of civil commitment" following a guilty plea). *See also* Commonwealth v. Abraham, 62 A.3d 343, 353 (Pa. 2012) (holding that defendant was not entitled to be warned about pension loss before accepting the plea).

25. Jenny Roberts characterizes the distinction between criminal and civil consequences as "mythical." Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of "Sexually Violent Predators,"* 93 MINN. L. REV. 670 (2008).

26. *Id.* at 674.

27. Eagly, *supra* note 4, at 295.

prosecutor who is bound by the formal legal recognition that a penalty constitutes punishment. Criminal procedure provides a set of constraints on law enforcement officials when it comes to formal criminal penalties. By contrast, with collateral consequences, prosecutors set the rules. This dynamic gives prosecutors the ability to selectively and at times inconsistently respond to collateral consequences.[28]

Prosecutors who respond to disproportionate collateral consequences face competing priorities. Their interest in proportionate outcomes may conflict with an interest in treating defendants who commit similar crimes the same.[29] This dynamic leads to the practice of "exacting a premium" or "counterbalancing."[30] When prosecutors agree to immigration-safe pleas, they may "compensate" for that concession by seeking harsher criminal penalties. They may also view this approach as a way to "authenticate" the collateral consequence.[31] For instance, the Ventura policy states that prosecutors "may insist upon more custody time or a longer period of probation" as a "concession," or as a way to ensure that the defendant "actually fac[es] the claimed collateral consequence."[32] For the prosecutor, the defendant's willingness to accept a more severe criminal penalty can provide a way to verify that the defendant actually faces the collateral consequence.

The authentication approach offers prosecutors a way to save time. But it also elevates legally irrelevant considerations. When prosecutors make judgments based on efficiency considerations, as opposed to judgments about culpability and proportionality, this dynamic creates "another layer of distortions that warp[s] the fair allocation of punishment."[33] This dynamic may be particularly difficult to identify in the context of collateral consequences, given that prosecutorial responses to

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28. For a discussion of this dynamic in other contexts, see Jennifer M. Chacón, *Producing Liminal Legality*, 92 DENV. U. L. REV. 709, 729 (2015) ("Basic liberties—freedom of movement, family unification, freedom from detention—are bestowed as an act of grace [exercised by law enforcement officials], not of right.").

29. Sara Sun Beale, *Prosecutorial Discretion in Three Systems: Balancing Conflicting Goals and Providing Mechanisms for Control*, *in* DISCRETIONARY CRIMINAL JUSTICE IN A COMPARATIVE CONTEXT 28–29 (2015) (arguing that prosecutors balance "competing goals of accountability, neutrality, efficiency, accuracy, and equal treatment" and that the U.S. criminal justice system's "heavy reliance on prosecutorial charging discretion . . . raises significant concerns about accuracy and about inconsistent treatment of similarly situated individuals").

30. Eagly, *supra* note 4, at 270; Jain, *supra* note 5, at 1226 (describing the counterbalance approach).

31. Jain, *supra* note 5, at 1226.

32. Eagly, *supra* note 4, at 270–71 (internal quotation marks omitted). The Santa Clara County District Attorney's Office takes a similar approach. *Id.* at 271.

33. Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2467 (2004) (discussing the "trial tax" and other ways that prosecutors' concerns about workloads can drive pleas); *see also* Wayne A. Logan & Ronald F. Wright, *Mercenary Criminal Justice*, 2014 U. ILL. L. REV. 1175, 1182 (discussing financial incentives in law enforcement).

collateral consequences are not likely to be uniform or publicly available.

Blurred civil–criminal boundaries create confusion, both at the level of law and practice. Some collateral consequences represent the phenomenon of "overcriminalization," where lawmakers intentionally employ severe sanctions without justification.[34] Others reflect lawmakers using criminal arrests and convictions as overbroad and imperfect proxies for other regulatory goals.[35] These dynamics challenge core notions of proportionality in sentencing. In theory, crimes ought to be graded in severity, with more severe consequences reserved for the most serious offenses. But with collateral consequences, what emerges instead is a patchwork of criminal and civil penalties.

On a systemic level, law enforcement agencies themselves may also employ imperfect proxies—such as by comparing the severity of the criminal offense to the severity of the civil consequence—to try to create outcomes they find roughly proportionate. This dynamic is further complicated by the fact that the policies must leave room for individual, street-level officers to exercise discretion. Prosecutors, police departments, sheriffs, and others necessarily exercise discretion in determining how to impose punishment, and they use different yardsticks when seeking proportionate outcomes. As a result, collateral consequences end up being enforced differently within and across localities. As Eagly notes, some immigrant protective policies are more protective than others. This system creates significant confusion about who enforces immigration law and other collateral consequences. It magnifies underlying concerns that key law enforcement judgments take place in a "black box."[36]

Prosecutors do not need to disclose whether and why they make concessions. This dynamic can amplify existing information deficits about policing decisions and police priorities,[37] particularly in communities that

34. Darryl K. Brown, *Criminal Law's Unfortunate Triumph over Administrative Law*, 7 J.L. ECON. & POL'Y 657, 657 (2011) ("Overcriminalization is the term that captures the normative claim that governments create too many crimes and criminalize things that properly should not be crimes."); Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. CRIM. L. & CRIMINOLOGY 613, 647–52 (2012) (arguing that the major problems associated with overcriminalization, such as excessive punishment and unfettered discretion, also apply to the immigration context); Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 716 (2005) ("Overcriminalization, then, is the abuse of the supreme force of a criminal justice system—the implementation of crimes or imposition of sentences without justification.").

35. For a discussion of this phenomenon in the context of arrests, see Jain, *supra* note 2, at 810–11.

36. Marc L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125, 129 (2008).

37. *See, e.g.*, Rachel Harmon, *Why Do We (Still) Lack Data on Policing?*, 96 MARQ. L. REV. 1119, 1121 (2013); Wayne A. Logan & Andrew Guthrie Ferguson, *Policing Criminal Justice Data*, 101 MINN. L. REV. 541, 546 (2016) (describing how errors in databases can lead to inaccurate arrests, and highlighting significant obstacles to "[s]etting standards and providing incentives to ensure data accuracy" in the context of law enforcement).

already contest local law enforcement practices.[38] It also extends the already powerful reach of criminal law enforcement agencies to other types of regulatory decisions, including to matters that lie well outside the bounds of law enforcement agencies' institutional competence.

Even as collateral consequences magnify the impact of law enforcement discretion, however, they can also tie the hands of law enforcement agencies. In some cases, law enforcement officials make the reasoned judgment that collateral consequences impose too much harm. Immigrant protective policies offer a way to ameliorate that harm. But employing immigrant protective policies can come at the expense of other interests. Prosecutors spend valuable time ascertaining and responding to collateral consequences. They may ultimately deviate from their preferred law enforcement practices in order to respond to collateral penalties.

Eagly offers a promising conceptual framework—immigrant equality—for thinking about how law enforcement officials should engage with collateral consequences. This framework recognizes that civil penalties are not just tacked on at the end of the criminal justice process. Rather, awareness of civil outcomes can shape law enforcement behavior from the outset. This dynamic can systemically magnify the effects of contact with the criminal justice system for classes of people.[39]

The concept of immigrant equality requires thinking about punishment systemically, rather than in terms of individual moral culpability. Conceptualizing criminal law in this way requires a departure from traditional criminal law doctrine and theory, which is focused on individual desert.[40] Her approach resonates with Jack Chin's argument that "the overall susceptibility to collateral consequences [functions as a]

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38. *See, e.g.*, Monica Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054 (2017); Matthew Desmond, Andrew V. Papachristos & David S. Kirk, *Police Violence and Citizen Crime Reporting in the Black Community*, 81 AM. SOC. REV. 857, 870–73 (2016); Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2042–56 (2011) (discussing the effects of implicit bias on police–citizen interactions). *See also* U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/4SD8-NGCJ] (discussing how the law enforcement's impermissible focus on revenue, rather than public safety, led to a host of unlawful and undesirable police conduct, including race-based wrongful arrests and excessive force).

39. As Eagly writes, "[i]mmigration policing can shift the priorities and practices of criminal law in ways that promote and disguise profiling of Latinos, Asians, and other people of color," and she discusses "racially and ethnically disparate treatment in prosecution and punishment practices that can be promoted by seemingly race neutral immigration enforcement practices." Eagly, *supra* note 4, at 296.

40. For a related discussion of equality in criminal sentencing, see Richard A. Bierschbach & Stephanos Bibas, *What's Wrong With Sentencing Equality?*, 102 VA. L. REV. 1447, 1451 (2016) (describing the " equality versus individualization debate" in criminal sentencing as "mask[ing] other substantive and institutional considerations that lie at the heart of sentencing.").

punishment."[41] Both approaches emphasize that status-based vulnerability to collateral consequences matter. One way this vulnerability can emerge is through policing, bail, prosecution, or other practices that have a disparate impact on immigrants or other communities.

Conclusion

The civil-criminal divide should not be conceptualized as a bright-line distinction. Collateral consequences of criminal arrests and convictions are often treated as an afterthought—as penalties that can be added on to a criminal sentence without changing the nature of the criminal justice system. At some point, however, civil penalties systemically alter the behavior of the actors who are tasked with enforcing the criminal law. Eagly's analysis provides both an important window into how this dynamic unfolds, as well as valuable insight into how to redress it.

41. Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1826 (2012).