

Prosecuting Collateral Consequences

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Criminal law scholars have long agreed that prosecutors wield vast and largely unreviewable discretion in the criminal justice system. This Article argues that this discretion now extends beyond criminal penalties and broadly reaches civil public policy decisions, such as deportation and licensing. As a result of ubiquitous plea bargaining and collateral consequences—state-imposed civil penalties that are triggered by criminal convictions—prosecutors can deliberately exercise discretion to trigger or avoid important civil consequences. This aspect of prosecutorial discretion has been underexamined, partly because of a lack of awareness of collateral consequences. But as a result of important new initiatives designed to promote information about collateral consequences, prosecutors as well as defendants are becoming more likely to know that even minor convictions can trigger much more serious civil penalties. As some commentators have pointed out, prosecutors who are aware of collateral consequences may have powerful incentives to drop charges or otherwise structure pleas to minimize the likelihood of certain collateral consequences. But importantly, prosecutors also have strong structural incentives to take the opposite approach and reach pleas to maximize the likelihood of civil penalties. For some prosecutors, enforcing collateral consequences serves as an administratively efficient substitute for a criminal conviction, as a source of leverage, as a way to circumvent the requirements of criminal procedure, as a means of achieving deterrence or retribution, or as a way to promote their own public policy preferences. This Article develops an analytic framework for understanding the structural incentives that lead prosecutors to influence collateral consequences; exposes legal and ethical problems associated with plea bargaining in light of collateral consequences; and argues that collateral consequences can undermine important interests in transparency and accountability.

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INTRODUCTION

Today, the consequences of having a criminal record can far outstrip any penalty imposed by criminal law.¹ Consider the case of Andre Venant, a longtime lawful permanent resident, who was punished with a seven-day sentence for evading subway fares but whose conviction landed him in immigration detention for six months.² Or consider the case of Washington, D.C. resident Maurice Alexander, who served a ten-day sentence for a misdemeanor conviction but paid a steeper penalty when his criminal record kept him out of public housing.³ His conviction carries a host of other penalties as well; it automati-

1. Criminal history records are defined as “identifiable descriptions and notations of arrests, detentions, indictments, or other formal criminal charges, and any disposition arising therefrom, including acquittal, sentencing, correctional supervision, or release.” 42 U.S.C. § 14616(I)(4)(A) (2012).

2. See Nina Bernstein, *When a MetroCard Led Far Out of Town; Post-9/11, Even Evading Subway Fares Can Raise the Prospect of Deportation*, N.Y. TIMES, Oct. 11, 2004, at B1. Turnstile jumping can be considered a “crime[] involving moral turpitude” for immigration purposes. Immigration and Nationality Act § 237(a)(2), 8 U.S.C. § 1227(a)(2) (2012).

3. Monica Haymond, *Should a Criminal Record Come with Collateral Consequences?*, NPR (Dec. 6, 2014, 5:03 PM), <http://www.npr.org/2014/12/06/368742300/should-a-criminal-record-come-with->

cally bars him from obtaining a license in the District of Columbia to work as a security officer, a real estate appraiser, an architect, a pharmacist, or a barber.⁴

Academic literature characterizes these types of collateral consequences—state-imposed civil penalties that are triggered by criminal convictions—as operating as an “invisible punishment.”⁵ The label highlights a troubling information gap: although some collateral consequences can function as a punishment from the perspective of defendants, all too often no actor in the criminal justice system—prosecutor, defense attorney, or judge—knows about them or takes them into account during the plea bargaining or sentencing process.

Due in part to remarkable advocacy by leading public defenders, this dynamic is changing. New initiatives now cross-reference criminal penalties with state-imposed civil consequences, allowing defendants to more easily learn whether a potential conviction might trigger a consequence like deportation.⁶ Because virtually all criminal convictions stem from guilty pleas, commentators and advocates have linked informed consideration of collateral consequences to the potential for better outcomes, particularly in the case of minor criminal convictions.⁷ The Supreme Court’s 2010 decision in *Padilla v. Kentucky*, which

collateral-consequences [http://perma.cc/A3TZ-WYOT] (stating that Alexander was convicted of an attempt to threaten).

4. *See id.*; *Choose a Jurisdiction*, NAT’L INVENTORY COLLATERAL CONSEQUENCES CONVICTION, <http://www.abacollateralconsequences.org/map/> [http://perma.cc/2V26-M5FP] (last visited Dec. 24, 2015) (interactive map that permits a user to view certain collateral consequences by jurisdiction).

5. *See, e.g.*, INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc Mauer & Meda Chesney-Lind eds., 2002); *see also* Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 700 (2002) (“Collateral consequences can operate as a secret sentence.”).

Throughout this Article, I use the term “collateral consequence” to refer only to state-imposed decisions, such as deportation, bars to obtaining professional licenses, or receiving public benefits. I focus on state-imposed action because that is the only type of collateral consequence that is capable of being identified systematically and taken into account during the plea bargaining process. *See infra* Section I.B. (discussing new developments to collect, code, and cross-reference collateral consequences against criminal convictions).

6. In addition to seeking to promote informational transparency, advocates have also made efforts to reduce the number of collateral consequences. Nonetheless, a vast network of collateral consequences remains in place. *See Search*, NAT’L INVENTORY COLLATERAL CONSEQUENCES CONVICTION, <http://www.abacollateralconsequences.org/search/> [http://perma.cc/2V26-M5FP] (last visited Dec. 24, 2015) (estimating that over 47,000 state and federal collateral consequences currently exist).

7. For a sampling of the commentary discussing this approach, see Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751, 1815 (2013) (describing strategies for obtaining “immigration-safe” pleas and the structural barriers to achieving them); Chin & Holmes, *supra* note 5, at 719–23; Michael Pinard, *Broadening the Holistic Mindset: Incorporating Collateral Consequences and Reentry into Criminal Defense Lawyering*, 31 FORDHAM URB. L.J. 1067 (2004); McGregor Smyth, *From “Collateral” to “Integral”*: *The Seismic Evolution of Padilla v. Kentucky and Its Impact on Penalties Beyond Deportation*, 54 HOW. L.J. 795, 812–14 (2011) [hereinafter Smyth, *From “Collateral” to “Integral”*]; McGregor Smyth, *Holistic Is Not a Bad Word: A Criminal Defense Attorney’s Guide to Using Invisible Punishments as an Advocacy Strategy*, 36 U. TOL. L. REV. 479, 494–96 (2005) [hereinafter Smyth, *Holistic Is Not a Bad Word*]; Robin Steinberg, *Heeding Gideon’s Call in the Twenty-First Century: Holistic Defense and the New Public Defense Paradigm*, 70 WASH. & LEE L. REV. 961, 1018 (2013); J. McGregor Smyth, Jr., *From Arrest to Reintegration: A Model for Mitigating Collateral Consequences of Criminal Proceedings*, 24 CRIM. JUST., Fall 2009, at 42.

held that defense attorneys must provide advice about certain immigration consequences of convictions, endorsed this practice.⁸ The Court linked plea bargaining in light of collateral consequences to mutual advantage, reasoning that “informed consideration” of collateral consequences “can only benefit both the State and noncitizen defendants” because “the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties.”⁹

This assumption, however, overlooks the incentives of a key player: the prosecutor.¹⁰ This Article looks forward to a legal regime in which parties can more easily learn about state-imposed collateral consequences and take them into account during the plea bargaining process. I agree that these efforts are desirable and necessary to allowing defendants to make informed decisions. However, in a criminal justice system defined by ubiquitous plea bargaining and a focus on low-level and redundant offenses, this approach inevitably and significantly expands the reach of prosecutorial discretion. It shifts discretion to prosecutors to decide whether and when to pursue collateral consequences. Even in low-level criminal cases, prosecutors can control important civil outcomes such as deportation, public benefits, and professional licensing.

Drawing on defense practice guides, court documents, prosecutorial policy statements, and existing empirical studies, this Article argues that prosecutors have powerful incentives to “prosecute” collateral consequences—meaning that they at times use their vast and unreviewable discretion over the criminal justice system to shape civil outcomes. In some cases, this dynamic may be justified, such as where the collateral consequence is closely related to the underlying criminal conduct and it has a demonstrable and proportionate deterrent effect. But this dynamic also necessarily allows prosecutors to influence collateral consequences in more far-reaching circumstances. Focusing on low-level offenses prosecuted in state courts, this Article develops three conceptual models for how informed prosecutors approach collateral consequences: collateral miti-

For a discussion of the overwhelming resolution of criminal cases by plea agreement, see *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012); *Missouri v. Frye*, 132 S. Ct. 1399 (2012); Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 YALE L.J. 2650, 2663 (2013) (describing *Frye* as making the “important statement that . . . ‘the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant’” (quoting *Frye*, 132 S. Ct. at 1407)).

8. 559 U.S. 356 (2010).

9. *Id.* at 373. In an opinion that described collateral consequences as “enmeshed” and “intimately related” to the criminal charges, the Court stated that defense counsel could seek “to plea bargain creatively . . . to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence.” *Id.* at 365, 373.

10. In making this claim, my focus lies outside the corporate crime context. For discussions of collateral consequences in the corporate plea negotiation context, see, for example, BRANDON L. GARRETT, *TOO BIG TO JAIL* (2014); Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 855 (2007); Julie R. O’Sullivan, *How Prosecutors Apply the “Federal Prosecutions of Corporations” Charging Policy in the Era of Deferred Prosecutions, and What That Means for the Purposes of the Federal Criminal Sanction*, 51 AM. CRIM. L. REV. 29, 32 (2014) (criticizing federal prosecutions that take into account collateral consequences).

gation, collateral enforcement, and an approach that I characterize as the counterbalance model, where prosecutors seek a harsher criminal penalty in exchange for avoiding a collateral outcome. Thus, a defendant who seeks an immigration-safe plea might be required to “plead up” to a more severe crime or serve a longer prison sentence.

Consider how an informed prosecutor might have exercised discretion in the case of Jennifer Smith, who was never convicted of a crime but whose record cost her a bank teller job in New York City.¹¹ Prosecutors offered to drop minor shoplifting charges if she agreed to a common form of conditional dismissal known as an “adjournment in contemplation of dismissal,” or ACD.¹² In an ACD, the defendant agrees to keep the arrest open for up to six months; if there are no new arrests in the interim, the case is dismissed.¹³ Smith’s case was dismissed and her arrest and prosecution were “deemed a nullity” under New York law.¹⁴ But she nonetheless lost the job because federal banking law treated the ACD as a prohibitive “diversion[ary] program.”¹⁵ After conducting a mandatory background check, the bank was required to rescind her offer.¹⁶

Suppose Smith had been aware that the ACD would cost her the job, and she raised the issue with the prosecutor. The prosecutor would have important structural incentives to mitigate job loss by dropping the charge altogether. The prosecutor could reason that Smith might otherwise reject the ACD and opt for a much more time consuming trial. A prosecutor who decides that the case does not merit the resources of a trial employs an administrative efficiency rationale. Alternatively, the prosecutor could drop the case because she views job loss itself as criminogenic: if Smith loses her ability to work, she could resort to committing serious crime. This approach represents a law enforcement rationale where the prosecutor links the collateral consequence to its impact on crime control. The prosecutor might also have a public policy preference not to upset the bank’s hiring decision or make the judgment that the job loss functions as a disproportionate, unjustified penalty. These rationales are conceptually distinct, but they all lead to the same result: Smith keeps the bank teller job.

Similar rationales also can be marshalled in support of a policy of collateral enforcement. Suppose the prosecutor’s first preference is a conviction; she has chosen to pursue the ACD only because of resource constraints or due to the absence of admissible evidence. The prosecutor might substitute job loss for the preferred criminal penalty—an approach that is also efficient because the prosecutor can avoid time spent in investigating and pursuing criminal charges. The prosecutor might see the civil penalty as deterring law-breaking, reasoning

11. *Smith v. Bank of Am. Corp.*, 865 F. Supp. 2d 298, 300 (E.D.N.Y. 2012).

12. *Id.*

13. N.Y. CRIM. PROC. LAW § 170.55 (McKinney 2014).

14. *Smith*, 865 F. Supp. 2d at 300, 302.

15. *Id.* at 304; *see also* 12 U.S.C. § 1829 (prohibiting those who have agreed to enter a diversionary program from “participat[ing] . . . in the conduct of the affairs of any insured depository institutions”).

16. *Id.* at 300.

that a suspected shoplifter could commit more serious crimes if placed in a bank. A prosecutor might have generalized public policy reasons for collateral enforcement; the prosecutor could believe that people with recent arrest histories tend to have bad judgment and that banks should not hire them. The prosecutor acts within her considerable discretion in making any of these judgments and seeking the ACD *because* it results in job loss.

The prosecutor might also take the middle ground: the counterbalance approach. Suppose the prosecutor is sympathetic to averting job loss but does not want to offer Smith a better plea than other defendants arrested on shoplifting charges. Or suppose the prosecutor suspects that Smith is lying about the job offer to get the case dismissed outright. The prosecutor could agree to dispose of the case in a way that does not affect the job, but only if Smith agrees to a disposition that is more severe than the ACD. The prosecutor requires Smith to “trade up” to a more severe sanction. From the prosecutor’s perspective, Smith’s willingness to pay the price of a more severe criminal penalty authenticates the collateral consequence. From the perspective of the prosecutor, it can also function as a way to treat like cases alike.

This Article develops these models and makes two key contributions. First, it offers an analytic framework for understanding how prosecutors influence collateral consequences. As advocates, courts, and commentators have rightly noted, informed prosecutors can use their discretion to mitigate; they can offer a flexible, reasoned response to collateral consequences that no one—prosecutors, defense attorneys, civil regulators, or society at large—believes to be appropriate.¹⁷ Yet the same dynamics that enable mitigation—overlapping criminal codes, a focus on low-level criminal offenses, charging discretion, and widespread collateral consequences—also allow prosecutors to enforce collateral consequences. Teasing apart the motivations that inform prosecutorial approaches to collateral consequences is necessary to assess whether and when informed plea bargaining will address the deeper concerns that some collateral consequences are disproportionate, procedurally unfair, and create arbitrary and inconsistent public policy.

Second, this Article uses this framework to demonstrate why equating informed consideration of collateral consequences with the potential for better outcomes may be too optimistic. As a general matter, criminal law scholars have been keenly attuned to the dangers of concentrating unreviewable power in the hands of prosecutors. But in the context of collateral consequences, commentators have welcomed prosecutorial discretion as an important—and in some cases the only—way to mitigate collateral consequences.

This Article supplements this account by showing that there are perils to blending civil and criminal penalties through the plea bargaining process. Prosecutors can take approaches that magnify their enforcement power, skirt the requirements of criminal procedure, or impose their own public policy prefer-

17. *See infra* Section I.C.

ences. This dynamic can also create broader harms for communities, law enforcement, and civil regulators. Collateral consequences create regulatory opacity. Civil consequences might follow without a prosecutor's knowledge, in spite of a prosecutor's efforts at mitigation, or as a result of reasoned enforcement efforts by prosecutors. Communities who seek to evaluate law enforcement outcomes thus face significant barriers to understanding how prosecutors are exercising their discretion.

This Article proceeds as follows: Part I provides context regarding prosecutorial discretion, the dominant critiques of collateral consequences, and emerging legal responses. Part II focuses on state prosecutors and develops an analytic framework for understanding how informed prosecutors might approach collateral consequences. Part III uses this framework to evaluate how informed consideration of collateral consequences expands the impact of prosecutorial discretion. It argues that prosecutorial discretion in light of collateral consequences has the potential to magnify the impact of certain collateral consequences, displace other competing concerns, and create barriers to understanding how prosecutors are exercising their discretion. I conclude with a preliminary evaluation of potential avenues for reform.

I. COLLATERAL CONSEQUENCES

Plea bargaining grants prosecutors enormous power in the criminal justice system. Defendants in low-level cases have powerful incentives to plead guilty as quickly as possible, regardless of the strength of the evidence against them. But today, even expedient and seemingly minor pleas can carry hidden costs. They can trigger much more serious collateral consequences. This Part situates plea bargaining and collateral consequences within the broader realm of U.S. criminal law administration. It discusses the dominant critiques of collateral consequences and then turns to recent efforts to promote informed plea bargaining.

A. CRIMINAL LAW AND THE PLEA BARGAINING PROCESS

For offenses ranging from the petty to the most severe, prosecutors—rather than judges and juries—are the arbiters of today's criminal justice system.¹⁸ Expansive codes criminalize a range of common behavior, giving prosecutors

18. ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 5 (2007) (describing prosecutors as “the most powerful officials in the criminal justice system” and discussing the power of prosecutors across a number of dimensions); Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 *STAN. L. REV.* 869, 871 (2009) (arguing that “the combination of law enforcement and adjudicative power in a single prosecutor is the most significant design flaw in the federal criminal system”); Gerard E. Lynch, *Frye and Lafler: No Big Deal*, 122 *YALE L.J. ONLINE* 39, 39 (2012) (“In our real justice system, the prosecutor is the effective adjudicator of guilt or innocence and the de facto sentencing authority.”); Ronald F. Wright & Kay L. Levine, *The Cure for Young Prosecutors' Syndrome*, 56 *ARIZ. L. REV.* 1065, 1067 (2014) (describing American prosecutors as the “de facto adjudicators in criminal courts”).

considerable charging discretion.¹⁹ Because well over ninety percent of all criminal convictions are the result of plea bargains, prosecutors exercise the functional authority to both “define the law on the street and decide who has violated it.”²⁰

For serious offenses, some commentators theorize that plea bargains work best when the deal reflects the parties’ predicted outcomes at trial.²¹ In this view, prosecutors ought to make offers based on how they value a case, taking into account considerations such as the seriousness of the charged offense and the likelihood of winning at trial.²² But prosecutors also take into account other factors, such as their own workloads and their long-term professional interests in building their reputations and securing a “win.”²³ The risk is that the desire to secure the plea bargain itself becomes the driving force, as opposed to concerns about justice or fairness.²⁴ As former federal district judge John Gleeson put it, “To coerce guilty pleas, and sometimes to coerce cooperation as well, prosecutors routinely threaten ultra-harsh, enhanced mandatory sentences that *no one*—not even the prosecutors themselves—thinks are appropriate.”²⁵ This practice might serve the interests of the prosecutor’s office—it allows for pleas to be secured efficiently—but it harms the public’s interest in securing justice.

For minor crimes in state courts, where prosecutors process a large volume of relatively low-level arrests, the plea pressures are distinct but nonetheless pervasive.²⁶ Although felonies receive the most attention, minor crimes constitute the bulk of state-court workloads.²⁷ For low-level offenses, prosecutors

19. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 512 (2001) (“Criminal law is both broad and deep: a great deal of conduct is criminalized, and of that conduct, a large proportion is criminalized many times over.”).

20. *Id.* at 511.

21. See, e.g., Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992).

22. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2465 (2004) (describing and criticizing the view that plea bargains “result in outcomes roughly as fair as trial outcomes” because “the likelihood of conviction at trial and the likely post-trial sentence largely determine plea bargains”).

23. *Id.* at 2470–72; Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749, 804 (2003).

24. See Richman, *supra* note 23, at 804.

25. *United States v. Kupa*, 976 F. Supp. 2d 417, 420 (E.D.N.Y. 2013); see also *id.* at 419–20 (“[F]ederal prosecutors exercise their discretion by reference to a factor that passes in the night with culpability: whether the defendant pleads guilty.”); Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1046 (2006).

26. Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE. L. REV. 1089, 1131 (2013) (discussing the plea pressures for misdemeanor defendants and advocating for more trials); Michelle Alexander, Opinion, *Go to Trial: Crash the Justice System*, N.Y. TIMES (Mar. 10, 2012), <http://www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html> [http://perma.cc/UF53-VPN6] (advocating for a large-scale refusal to plea bargain); see also Darryl K. Brown, *The Perverse Effects of Efficiency in Criminal Process*, 100 VA. L. REV. 183 (2014) (discussing how the criminal justice system has grown more efficient in processing cases, and raising the possibility that these efficiency gains come at the expense of competing values, including accuracy).

27. R. LAFONTAIN ET AL., NAT’L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2010 STATE COURT CASELOADS 24 (2012), <http://www.courtstatistics.org/media/Microsites/>

may have little desire or ability to seek a lengthy sentence.²⁸ Rather than threatening harsher sanctions, prosecutors might offer a “string of ever-sweeter plea offers” as the trial date approaches, knowing that for the defendant the hassle of seeking a trial could outweigh its benefits.²⁹ Consider the case of Bronx, New York City resident Michailon Rue, who had to appear in court seven times over the course of fifteen months to contest misdemeanor marijuana charges.³⁰ The case ultimately was dismissed on speedy trial grounds but only after the repeated court appearances cost him his \$17-an-hour job as a maintenance worker.³¹

When defendants face the “time, effort, money, and opportunities lost as a direct result of being caught up in the [lower court criminal justice] system”—what Malcolm Feeley described as “process costs” in his seminal 1979 study—many make a rational decision to accept a quick plea rather than proceed to trial.³² If a defendant weighs the formal punishment against much more severe process costs, a “misdemeanor defendant, even if innocent, usually is well advised to waive every available procedural protection (including the right to counsel) and to plead guilty at the earliest possible opportunity.”³³ As Feeley put it, in the lower courts, the “process is the punishment.”³⁴

In a pair of recent articles, Issa Kohler-Hausmann further refines this picture.³⁵ Drawing on a multiyear study of New York City misdemeanor courts, Kohler-Hausmann demonstrates that quick, seemingly minor pleas can carry hidden costs.³⁶ A first-time offender might be offered a quick disposition such

Files/CSP/DATA%20PDF/CSP_DEC.ashx [http://perma.cc/HQ5P-XLCX] (showing that misdemeanors significantly outnumber felonies in the criminal caseloads of seventeen selected states); R. LAFOUNTAIN ET AL., NAT’L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2008 STATE COURT CASELOADS 47 (2010), <http://www.courtstatistics.org/Other-Pages//media/Microsites/Files/CSP/EWSC-2008-Online.ashx> [http://perma.cc/4PWV-5BNS] (showing that misdemeanor cases constitute an “overwhelming majority of criminal caseloads”); Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 280–82 (2011).

28. Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1148–49 (2008).

29. William Glaberson, *In Misdemeanor Cases, Long Waits for Elusive Trials*, N.Y. TIMES (Apr. 30, 2013), <http://www.nytimes.com/2013/05/01/nyregion/justice-denied-for-misdemeanor-cases-trials-are-elusive.html> [http://perma.cc/B8MD-W2GL].

30. *Id.*

31. These delays are not atypical of Bronx courts. *Id.*

32. MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* 30–31 (1979).

33. Albert W. Alschuler, *Implementing the Criminal Defendant’s Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 953 (1983); *see also* Bowers, *supra* note 28, at 1136 (“If the defendant can get a plea to a misdemeanor and time served, then the process constitutes the whole punishment.”).

34. FEELEY, *supra* note 32.

35. *See* Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611 (2014) [hereinafter Kohler-Hausmann, *Managerial Justice*]; Issa Kohler-Hausmann, *Misdemeanor Justice: Control Without Conviction*, 119 AM. J. SOC. 351 (2013) [hereinafter Kohler-Hausmann, *Misdemeanor Justice*].

36. *See* Kohler-Hausmann, *Managerial Justice*, *supra* note 35, at 644–46; Kohler-Hausmann, *Misdemeanor Justice*, *supra* note 35, at 366–68.

as an ACD, but once that disposition is entered, it becomes a “mark” that comes to hold independent significance.³⁷ If the defendant is arrested again, prosecutors seek a more severe penalty based on the existence of the prior mark rather than on the strength of the evidence in a given case.³⁸

Thus, defendants who contest petty charges face significant process costs. But they also face additional hidden costs within the criminal justice system if they accept the plea.

B. RESPONDING TO COLLATERAL CONSEQUENCES

Even beyond the criminal justice penalties, arrested individuals now can also expect to experience a host of additional state-imposed penalties. The formal criminal penalty constitutes just one aspect of the punishment. From the moment of arrest, criminal records create a cascade of noncriminal consequences. Perhaps the best known are felony bans that affect constitutional rights such as those that prohibit felons from voting,³⁹ serving on juries,⁴⁰ or carrying firearms.⁴¹ But the consequences of contact with the criminal justice system reach much further.⁴² The American Bar Association currently estimates 44,000 state and federal collateral consequences of conviction exist nationwide.⁴³ This does not even begin to account for the civil consequences that attach only to arrests or for the discretionary consequences that may be triggered as a result of employer background checks.⁴⁴ An informed defendant would weigh the penal-

37. See Kohler-Hausmann, *Managerial Justice*, *supra* note 35, at 644–46; Kohler-Hausmann, *Misdemeanor Justice*, *supra* note 35, at 367–70.

38. See Kohler-Hausmann, *Managerial Justice*, *supra* note 35, at 646; Kohler-Hausmann, *Misdemeanor Justice*, *supra* note 35, at 369–70.

39. CHRISTOPHER UGGEN ET AL., THE SENTENCING PROJECT, STATE-LEVEL ESTIMATES OF FELON DISENFRANCHISEMENT IN THE UNITED STATES, 2010, at 1 (2012), http://sentencingproject.org/doc/publications/fd_State_Level_Estimates_of_Felon_Disen_2010.pdf [<http://perma.cc/8RJE-LMHR>] (estimating that 2.5% of eligible voters are barred from voting because of a criminal record); see also MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS 2 (2015) (describing the impact of criminal convictions in disenfranchising one out of every forty potential voters); JAMES B. JACOBS, THE ETERNAL CRIMINAL RECORD 250–52 (2015) (discussing the effects of felon disenfranchisement).

40. 28 U.S.C. § 1865(b)(5) (2012).

41. 18 U.S.C. § 922(g).

42. Michael Pinard, *Reflections and Perspectives on Reentry and Collateral Consequences*, 100 J. CRIM. L. & CRIMINOLOGY 1213, 1214–15 (2010) (“At no point in United States history have collateral consequences been as expansive and entrenched as they are today.”).

43. Office of Justice Programs, *National Inventory of Collateral Consequences*, NATIONAL INSTITUTE OF JUSTICE (Feb. 4, 2016), <http://www.nij.gov/topics/courts/pages/collateral-consequences-inventory.aspx> [<https://perma.cc/DR3K-SZQS>].

44. For a discussion of how arrests alone can impact decisions relating to immigration, employment, housing, and education, see Eisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809 (2015). For discussions of employer background checks, see MICHELLE NATIVIDAD RODRIGUEZ & MAURICE Emsellem, THE NAT’L EMP’T LAW PROJECT, 65 MILLION “NEED NOT APPLY”: THE CASE FOR REFORMING CRIMINAL BACKGROUND CHECKS FOR EMPLOYMENT 15 (2011), http://www.nelp.org/content/uploads/2015/03/65_Million_Need_Not_Apply.pdf [<http://perma.cc/6X5Z-VQFP>]; U.S. EQUAL EMP’T OPPORTUNITY COMM’N, ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, at 1, 12 (2012), http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf [<http://perma.cc/TCQ5-HVK>].

ties attached to having an open arrest—the punishing process, as well as the likelihood that the arrest will pose a barrier to finding employment or receiving public benefits—against the penalties, both civil and criminal, triggered by the conviction.

Collateral consequences attach even to minor criminal records. Certain misdemeanor convictions bar defendants from moving in with or even visiting family in public housing.⁴⁵ Some states ban those with misdemeanor convictions from working as home health aids or in facilities that serve the disabled.⁴⁶ Misdemeanor domestic violence convictions can disrupt custody arrangements.⁴⁷ Minor crimes, such as public urination, can result in inclusion in a state’s sex offender registry.⁴⁸ Even arrests alone can result in the suspension of a professional license or lead to eviction from public housing.⁴⁹ Minor arrests can trigger fees (both civil and criminal), and if the defendant cannot pay, she can expect to face additional punishment.⁵⁰

These types of collateral consequences raise several related problems. Whereas some collateral consequences are closely related to the underlying crime and respond to a pressing and specific public safety problem, others are disproportionate, imposed without procedural protections, and create arbitrary and inconsistent public policy.⁵¹

As a general matter, proportionality reflects the principle “that larger harms imposed by government should be justified by more weighty reasons and that more severe transgressions of the law be more harshly sanctioned than less

45. 42 U.S.C. § 13661(c) (2012); THE BRONX DEFS., *THE CONSEQUENCES OF CRIMINAL PROCEEDINGS IN NEW YORK STATE* 2 (2014), <http://www.bronxdefenders.org/wp-content/uploads/2014/08/Consequences-of-Criminal-Proceedings-Aug2014.pdf> [<https://perma.cc/PTN9-AC3Q>]; Fox Butterfield, *Freed from Prison, but Still Paying a Penalty*, N.Y. TIMES (Dec. 29, 2002), <http://www.nytimes.com/2002/12/29/us/freed-from-prison-but-still-paying-a-penalty.html> [<http://perma.cc/N9RU-RV4B>].

46. Roberts, *supra* note 27, at 299.

47. See, e.g., DEL. CODE ANN. tit. 13, § 705A (2016) (rebuttable presumption against custody); FLA. STAT. § 61.13 (2015); ALISA SMITH & SEAN MADDAN, NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, *THREE-MINUTE JUSTICE: HASTE AND WASTE IN FLORIDA’S MISDEMEANOR COURTS* 19 (2011); Deborah Ahrens, Note, *Not in Front of the Children: Prohibition on Child Custody as Civil Branding for Criminal Activity*, 75 N.Y.U. L. REV. 737, 754–55 (2000).

48. See, e.g., *In re Birch*, 515 P.2d 12, 13–14 (Cal. 1973); John D. King, *Beyond “Life and Liberty”:* *The Evolving Right to Counsel*, 48 HARV. C.R.-C.L. L. REV. 1, 28 (2013) (“[E]very state now has an online sex offender registry, a system of community notification, and a system of exchanging information with other states and the federal government. In terms of scope, registries have expanded to include those convicted of even very minor misdemeanor offenses.” (footnotes omitted)).

49. See Jain, *supra* note 44, at 840–41; see also SARGENT SHRIVER NAT’L CTR. ON POVERTY LAW, *WHEN DISCRETION MEANS DENIAL: A NATIONAL PERSPECTIVE ON CRIMINAL RECORDS BARRIERS TO FEDERALLY SUBSIDIZED HOUSING* vi–vii (2015), <http://povertylaw.org/sites/default/files/images/publications/WDMDFinal.pdf> [<https://perma.cc/5C7M-VHBA>].

50. See generally Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277 (2014).

51. See *Project Description*, ABA NATIONAL INVENTORY OF THE COLLATERAL CONSEQUENCES CONVICTION, <http://www.abacollateralconsequences.org/description/> [<https://perma.cc/S9CS-LA6U>] (last visited Dec. 25, 2015) (noting that some collateral consequences serve a legitimate function, such as keeping firearms from violent offenders or responding to particular public safety concerns).

severe ones.”⁵² Theories of deterrence or retribution are premised on the idea that the punishment ought to fit the crime.⁵³ But collateral consequences can far outstrip the criminal penalty, and they can function as a punishment long after any formal criminal penalty has been served.⁵⁴ If a relatively short criminal sentence serves the aim of the criminal law, additional civil penalties run the risk of “piling on”; they run the risk of creating too much punishment.⁵⁵ This dynamic is particularly troubling in the context of the broader criticism that U.S. criminal justice itself is overly punitive⁵⁶ and disproportionately burdens the poor and racial minorities.⁵⁷

Collateral consequences can be administered in a way that lacks basic procedural fairness. Criminal punishment, the “heavy artillery of society,” triggers special procedural protections.⁵⁸ Defendants who accept pleas must at a minimum have a “full understanding of what the plea connotes and of its consequence.”⁵⁹ But state-imposed civil penalties do not trigger similar procedural protections even though they may function exactly like criminal punishment. Immigrant defendants, for instance, may continue to be held in state-run

52. Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3098 (2015).

53. For a discussion and critique of proportionality jurisprudence, see Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677 (2005).

54. See, e.g., Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1790 (2012) (describing collateral consequences as a new form of “civil death”—a “form of punishment” that “extinguish[es] most civil rights of a person convicted of a crime and largely put[s] that person outside the law’s protection”). See also Colgan, *supra* note 50, for the argument that certain fines are disproportionate.

55. Christopher Uggen & Robert Stewart, *Piling On: Collateral Consequences and Community Supervision*, 99 MINN. L. REV. 1871, 1872 (2015) (“In American football, ‘piling on’ . . . is illegal because it is unnecessary, slows the progress of the game, and often results in serious injury.” (footnote omitted)).

56. See, e.g., BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING 8 (2001) (criticizing “order-maintenance” policing strategies that focus on low-level arrests as ineffective and arguing that they have become popular because they conceptualize “conduct that was once merely offensive or annoying” as “conduct that causes serious crime”); JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007) (arguing that crime-control rationales are too often used to legitimate regulatory decisions); JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE (2003) (providing a historical legal account of how certain “liberal” features of American culture have led to more punitive penal policies than those in Europe).

57. See, e.g., MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 26–38 (1998) (offering examples of discrimination against African-Americans throughout the criminal justice process as compared to whites); Jeffrey Fagan & Garth Davies, *Street Stops and Broken Windows: Terry, Race, and Disorder in New York City*, 28 FORDHAM URB. L.J. 457, 477–78 (2000) (showing a vast and disproportionate increase in misdemeanor arrests of minorities in poor urban areas under New York City’s stop and frisk policy); Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 470, 490 (2010).

58. Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 9 (2006); see also Francis A. Allen, *The Morality of Means: Three Problems in Criminal Sanctions*, 42 U. PITT. L. REV. 737, 738 (1981).

59. *Boykin v. Alabama*, 395 U.S. 238, 243–44 (1969).

jails after their prison sentence is complete, but they may never be informed about the civil penalty.⁶⁰ To be sure, the motives for placing someone in civil versus criminal detention may be distinct.⁶¹ But from the perspective of the defendant, the distinction is formal at best. Plea bargaining reflects the assumption that defendants choose pleas because they provide the opportunity to secure sanctions at the lowest cost to themselves.⁶² Thus, defendants must at minimum understand the penalties triggered by a plea for this choice to be meaningful. Defendants who lack information about the state-imposed consequences that will result from their conviction—regardless of whether they are codified in civil or criminal law—miss a crucial piece of information, one that might affect their decision-making calculus.

Another related concern is arbitrariness. Collateral consequences can function as overbroad and imprecise regulatory proxies. Lawmakers “overcriminalize” when they impose criminal penalties that exceed a reasonable judgment about fit or appropriateness.⁶³ As Jonathan Simon puts it, lawmakers “govern through crime” when they link public policy decisions to crime control, even when those decisions are motivated by factors other than their impact on crime.⁶⁴ Civil regulators then use criminal records—some of which may be overbroad to begin with—as proxies for their own decision making.⁶⁵ This trend is also driven by technological changes that allow for quick and easy access to criminal background checks.⁶⁶ When overbroad collateral consequences attach to overbroad criminal records and when regulators can easily and inexpensively access criminal record history, the resulting system can stray from the intended regulatory agenda. The underlying criminal record is used as a proxy, even though it may not correlate in a meaningful way to risk assessment or to the relevant

60. See DORA SCHIRO, U.S. DEP’T OF HOMELAND SEC., IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS 10 (2009) (reporting that as of 2009, fifty percent of those in immigration custody were housed in local jails); see also Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 45 (2010) (discussing how certain convictions trigger mandatory immigration detention after defendants complete their criminal sentence).

61. See *Smith v. Doe*, 538 U.S. 84, 92, 96–97 (2003) (holding that a sex offender registry is not “punishment” and discussing different factors that might go to punitive intent); *Wallace v. State*, 905 N.E.2d 371, 384 (Ind. 2009) (holding that a civil sex offender registration requirement functions as a form of punishment).

62. Daniel C. Richman, *Bargaining About Future Jeopardy*, 49 VAND. L. REV. 1181, 1187 (1996) (“Every defendant facing criminal charges seeks repose: to end his exposure to criminal sanctions at the least cost to himself.”).

63. See Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 714 (2005) (arguing that “the criminal sanction should be reserved for specific behaviors and mental states that are so wrongful and harmful to their direct victims or the general public as to justify the official condemnation and denial of freedom that flow from a guilty verdict”); see also Stuntz, *supra* note 19.

64. See SIMON, *supra* note 56, at 4 (arguing that the “category of crime” is deployed strategically “to legitimate interventions that have other motivations”).

65. See Jain, *supra* note 44; James Jacobs & Tamara Crepet, *The Expanding Scope, Use, and Availability of Criminal Records*, 11 N.Y.U. J. LEGIS. & PUB. POL’Y 177, 177 (2008).

66. See, e.g., Jacobs & Crepet, *supra* note 65, at 179–80; Erin Murphy, *Databases, Doctrine & Constitutional Criminal Procedure*, 37 FORDHAM URB. L.J. 803, 804 (2010).

regulatory priority.⁶⁷

Immigration scholars have made the argument, for instance, that overbroad definitions of “aggravated felonies” and crimes involving “moral turpitude” now lead to deportation.⁶⁸ Labels such as “aggravated felon” or “crime involving moral turpitude” indicate a focus on those who have committed serious offenses. But these categories also encompass minor crimes such as turnstile jumping, hair-pulling, or stealing a video game.⁶⁹

C. PROMOTING INFORMED PLEA BARGAINING

In recent years, commentators, judges, and policymakers have sharpened their focus on the procedural fairness problem. A host of nascent public policy and legal changes are aimed at promoting informed plea bargaining. Until the 2010 *Padilla* decision, defense attorneys had no obligation to inform defendants about consequences such as deportation. Most courts held that a defendant need only be informed of the “direct” consequences of a plea but not of the “collateral” consequences, with the prevailing distinction turning on whether the consequence is “definite, immediate, and largely automatic.”⁷⁰ In practice, this line is “mythical,” with significant variation in how courts characterize the same consequence.⁷¹ Some courts applying the collateral–direct distinction

67. Jain, *supra* note 44 (discussing the use of arrests as a proxy for immigration officials, employers, public housing providers, and others); *see also* Malcolm M. Feeley & Jonathan Simon, *The New Penology: Notes on the Emerging Strategy of Corrections and Its Implications*, 30 CRIMINOLOGY 449 (1992) (describing a shift away from punishing individuals and toward managing aggregates of dangerous groups through a focus on surveillance and other forms of monitoring).

68. Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L. REV. 469, 483–84 (2007) (describing the “aggravated felon” as a “colossus” that “has accounted for the steadiest and most expansive growth in the range of crimes that give rise to removal”); Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1939–40 (2000) (noting that “a crime need not be either aggravated or a felony” to qualify as an aggravated felony); *see also* Carachuri-Rosendo v. Holder, 560 U.S. 563, 574 (2010) (“We do not usually think of a ten-day sentence for the unauthorized possession of a trivial amount of a prescription drug as an ‘aggravated felony.’”).

69. *See* Stephen Lee, *De Facto Immigration Courts*, 101 CALIF. L. REV. 553, 560–61 (2013); *see also* Cade, *supra* note 7, at 1759 (collecting examples of minor criminal offenses that have been considered aggravated felonies for deportation purposes). Removal decisions have historically been based on “the statutory definition of the offense of conviction, not to the particulars of an alien’s behavior.” *Mellouli v. Lynch*, 135 S. Ct. 1980, 1986 (2015); *see also* Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1701, 1746 (2011). For instance, theft is a crime of moral turpitude. Thus, when turnstile jumping is defined as a “theft of services,” it can trigger deportation. *See* Immigration and Nationality Act § 237(a)(2)(A)(ii), 8 U.S.C. § 1227(a)(2)(A)(ii) (2012); *Mojica v. Reno*, 970 F. Supp. 130, 137 (E.D.N.Y. 1997).

70. *Steele v. Murphy*, 365 F.3d 14, 17 (1st Cir. 2004) (holding that “[t]he distinction between direct and collateral consequences” turns on whether the consequence is “definite, immediate, and largely automatic”); *see also* *Brady v. United States*, 397 U.S. 742, 748, 755 (1970) (holding that defendant must be informed of the “direct consequences” of a plea); *Cuthrell v. Dir., Patuxent Inst.*, 475 F.2d 1364, 1366 (4th Cir. 1973).

71. Margaret Colgate Love, *Collateral Consequences After Padilla v. Kentucky: From Punishment to Regulation*, 31 ST. LOUIS U. PUB. L. REV. 87, 96–98 (2011) (describing the collateral consequences

have held that guilty pleas are valid where defendants were unaware of collateral consequences such as the loss of benefits,⁷² revocation of a professional license or prior job,⁷³ or the possibility of lifelong civil commitment.⁷⁴

In *Padilla*, the U.S. Supreme Court modified the collateral consequences doctrine. The majority opinion characterized deportation as an “enmeshed” penalty that is so “intimately related” to the criminal charges that it is “‘most difficult’ to divorce the penalty from the conviction.”⁷⁵ Because deportation operates as a quasi-punishment, the Court held that defense counsel must advise defendants about certain clearly predictable immigration consequences of criminal convictions.⁷⁶

The *Padilla* opinion represented a significant change in doctrine. It established a legal standard that reflected underlying changes in professional practice standards. As the Court noted, leading defense attorneys—such as those that have a self-described focus on “holistic,” “community-centered,” or “participatory” defense—already incorporate collateral consequences into their defense and advocacy strategy.⁷⁷ Their basic vision of advocacy focuses not only on

doctrine); Jenny Roberts, *The Mythical Divide Between Collateral and Direct Consequences of Criminal Convictions: Involuntary Commitment of “Sexually Violent Predators,”* 93 MINN. L. REV. 670, 679–80 (2008) (describing circuit splits over the meaning of “direct” versus “collateral” consequences).

72. See *United States v. Nicholson*, 676 F.3d 376, 382 (4th Cir. 2012) (discussing loss of federal benefits).

73. See *Kratt v. Garvey*, 342 F.3d 475, 485 (6th Cir. 2003) (discussing loss of a license); *United States v. Crowley*, 529 F.2d 1066, 1072–73 (3d Cir. 1976) (discussing loss of job).

74. See *United States v. Youngs*, 687 F.3d 56, 61 (2d Cir. 2012) (discussing civil commitment after completing criminal sentence); *Steele*, 365 F.3d at 18 (discussing potential lifetime commitment as a “sexually dangerous person”).

75. *Padilla v. Kentucky*, 559 U.S. 356, 365–66 (2010) (quoting *United States v. Russell*, 686 F.2d 35, 38 (D.C. Cir. 1982)).

76. *Id.* at 369.

77. For a sampling of public defender offices that focus on addressing collateral consequences, see, for example, BROOKLYN DEF. SERVS., <http://bds.org/> [<http://perma.cc/7T8Q-JYFM>] (last visited Dec. 25, 2015) (providing expertise relating to family defense, civil justice, and immigration in addition to criminal defense); *Explore Holistic Defense*, BRONX DEFS., <http://www.bronxdefenders.org/who-we-are/how-we-work/> [<http://perma.cc/73GH-BAAZ>] (last visited Dec. 24, 2015); *Immigration Practice Group*, WIS. ST. PUB. DEF., <http://wispd.org/index.php/legal-resources/specialty-practices/immigration-practice> [<http://perma.cc/PXQ3-9HYM>] (last visited Dec. 25, 2015) (separate immigration practice); *Civil Legal Services Division*, PUB. DEF. SERV. FOR DIST. COLUMBIA, <http://pdsdc.org/about-us/legal-services> [<http://perma.cc/TY35-ZWTT>] (last visited Dec. 24, 2015) (providing immigration, housing, and family services); NEIGHBORHOOD DEF. SERV. HARLEM, <http://www.ndsny.org/> [<http://perma.cc/7QSG-EAJM>] (last visited Dec. 24, 2015) (providing prearrest services, family practice, housing advocacy, immigration advocacy, and indigent defense); *Our Mission & Story*, ARCHCITY DEFS., <http://www.archcitydefenders.org/who-we-are/our-mission-story/> [<http://perma.cc/E93A-ZRMH>] (last visited Dec. 25, 2015) (providing “[h]olistic [d]efense” to address civil needs arising out of contact with the criminal justice system); *Who We Are*, KNOX CTY. PUB. DEFS. COMMUNITY LAW OFF., <http://www.pdknox.org/who-we-are/> [<http://perma.cc/NY4Z-VA84>] (last visited Dec. 24, 2015) (embracing a model of “holistic” defense).

For discussions of these types of approaches, see, for example, Ingrid V. Eagly, Gideon’s *Migration*, 122 YALE L.J. 2282, 2297–300 (2013) (discussing the importance of “immigration expertise” when counseling criminal defendants); Smyth, *Holistic Is Not a Bad Word*, *supra* note 7, at 490–91; Kim

success at trial, but also on ascertaining collateral consequences and managing the impact of a criminal record in the way that matters the most for the defendant.⁷⁸ This approach focuses on how the criminal record will impact the defendant, as opposed to formal legal categories of civil versus criminal. Defenders view managing the criminal record—in a way that allows the defendant to work, maintain public benefits, obtain student loans, and attend school—as a critical part of their agenda.

Plea bargaining plays an important role in this process. Due to redundant criminal codes, defendants in petty cases often can be charged with multiple crimes.⁷⁹ Out of this potential menu of charges, it may be possible to strategically plead guilty only to those that do not carry an immediate risk of a collateral consequence.

A recent Pennsylvania Supreme Court case illustrates the potential of this approach. Joseph Abraham was sixty-seven when he resigned from his job as a school teacher and was charged with four equivalent and overlapping misdemeanors.⁸⁰ During the plea negotiation, the prosecutor sought a guilty plea to one or two charges and a penalty of three years' probation.⁸¹ Only after entering his plea did Abraham learn that he had pled to the only offense that also mandated permanent forfeiture of his pension—an additional penalty of \$1500 a month for the rest of his life.⁸²

This case illustrates why informed consideration of collateral consequences matters; informed defendants may well prefer outcomes that deviate from what they would choose if only the criminal consequence was on the table. In the immigration context, for instance, an immigrant defendant convicted of misdemeanor shoplifting charges might prefer a six-month sentence of actual prison time over a twelve-month suspended sentence. In the absence of collateral consequences, the suspended sentence would be better, at least if the defendant reasonably expected never to spend a day in prison. But a sentence of one year, regardless of whether the entirety of the sentence is suspended, renders the

Taylor-Thompson, *Taking It to the Streets*, 29 N.Y.U. REV. L. & SOC. CHANGE 153, 155–57 (2004) (arguing that defenders should focus on identifying and responding to common needs among clients, rather than focusing more narrowly on individualized representation).

78. Smyth, *Holistic Is Not a Bad Word*, *supra* note 7, at 490 (holistic defense is designed “to serve a client as a whole person—a person with complex needs, a family, and who is a part of a community—rather than a case or a legal issue”); Robin Steinberg & David Feige, *Cultural Revolution: Transforming the Public Defender's Office*, 29 N.Y.U. REV. L. & SOC. CHANGE 123, 123–24 (2004) (arguing that an “obsessive focus on the trial as the crowning achievement of the public defender leads inescapably to the privileging of the canny trial attorney over the caring and effective advocate focused on both the client's legal and extra-legal needs”).

79. Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 TEMP. POL. & C.R. L. REV. 369, 369 (2010) (arguing that “broad and overlapping criminal laws let police and prosecutors decide who actually deserves to be charged and with what crimes”).

80. See *Pennsylvania v. Abraham*, 62 A.3d 343, 344 (Pa. 2012); Brief of the Appellee at 1, *Abraham*, 62 A.3d 343 (No. 36 WAP 2010), 2011 WL 2646523, at *1.

81. Brief of the Appellee, *supra* note 80, at 2–3.

82. *Id.* at 3–4.

shoplifting conviction an “aggravated felony” that carries the risk of deportation.⁸³ Given these dynamics, “[p]articularly with misdemeanor charges, many [defendants] would rationally choose even a short term of incarceration to avoid some harsh ‘collateral’ consequences.”⁸⁴

Informed plea bargaining is no panacea, of course. Although professional practice standards have shifted toward providing advice about collateral consequences, indigent defense remains chronically underfunded.⁸⁵ For many defenders, incorporating advice about collateral consequences poses an untenable administrative burden. During the *Padilla* briefing, a number of state prosecutors emphasized the cost associated with providing defendants with information about collateral consequences. They warned that requiring defense attorneys to provide advice about immigration consequences would “break the back of the plea agreement system” because it would require a “‘dream team’ of five or more lawyers for each indigent defendant.”⁸⁶

The complaint is justified. It reflects the byzantine network of collateral consequences that currently exists. Collateral consequences stem from a number of different legal sources. Even top-tier defense lawyers face significant challenges in ascertaining, much less navigating, them. The problem is not limited to state and federal regulations. Some municipalities also disqualify those with criminal records from engaging in activities such as street vending or driving a taxi.⁸⁷ These types of regulations are not codified in any one location, and they can change if a defendant makes a local move.⁸⁸ Discretionary consequences—those that might be triggered by a conviction but are not mandated—also require significant investigation by defense attorneys.⁸⁹ There is an enormous variation in terms of how well defense attorneys are able to respond to collateral consequences. Similar to *Gideon*, the most meaningful impact of *Padilla* might lie in establishing a minimum baseline of constitutionally adequate professional practice, even through practices currently fail to comport with that standard.⁹⁰

83. See 8 U.S.C. § 1101(a)(43)(G) (2012); *United States v. Christopher*, 239 F.3d 1191, 1192, 1194 (11th Cir. 2001).

84. THE BRONX DEFS., *supra* note 45, at 5 (emphasis omitted).

85. Adam M. Gershowitz, *Raise the Proof: A Default Rule for Indigent Defense*, 40 CONN. L. REV. 85, 91–100 (2007) (discussing funding deficits in indigent defense).

86. Brief for the States of Louisiana & Alaska et al. as Amici Curiae in Support of Respondent at 1, 11–12, *Padilla v. Kentucky*, 559 U.S. 356 (2010) (No. 08-651), 2009 WL 2564713 [hereinafter Brief for States]. See generally Smyth, *From “Collateral” to “Integral,”* *supra* note 7 (discussing the standard of care required of defense attorneys by *Padilla*).

87. See Amy P. Meek, *Street Vendors, Taxicabs, and Exclusion Zones: The Impact of Collateral Consequences of Criminal Convictions at the Local Level*, 75 OHIO ST. L.J. 1, 16–17 (2014).

88. See *id.* at 17.

89. Defense attorneys also have limited ability to advise about private consequences, such as employers who use overbroad disqualifications on the basis of criminal records. See RODRIGUEZ & Emsellem, *supra* note 44, at 1, 15 (discussing job postings identifying a “[c]lean criminal record, no misdemeanors, no felonies” as a requirement even for jobs such as a diesel mechanic (emphasis omitted)).

90. Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After Gideon v. Wainwright*, 122 YALE L.J. 2150, 2152–53 (2013) (“The representation received by most poor people

Even with information about collateral consequences, defendants may not be able to strike a better deal.⁹¹ Prosecutors are more likely to mitigate if the charged offense is relatively minor.⁹² With serious crimes, prosecutors might find that there is little principled room to recharacterize charges in a way that does not trigger a noncriminal penalty, given that felonies carry a wide range of mandatory penalties.⁹³ Prosecutors may also view collateral consequences as inconsequential if the charges are serious.⁹⁴ Thus, defendants and prosecutors may have the most room to negotiate pleas that avoid important collateral sanctions in the case of minor criminal offenses.

Defendants who seek to plea bargain in light of collateral consequences now have important new resources at their disposal. Recent public policy measures reduce the administrative burden associated with understanding the civil consequences of guilty pleas. In 2007, Congress directed the National Institute of Justice to collect and analyze state-imposed collateral consequences for each U.S. jurisdiction. This culminated in the 2015 launch of the National Inventory of Collateral Consequences of Conviction, a database that collects, codes, and seeks to comprehensively cross-reference collateral consequences in an easily accessible format. The database allows a user to search an interactive map, enter the type of conviction in a particular jurisdiction, and view a list of mandatory or discretionary collateral consequences that might be triggered by state or federal law.⁹⁵

A number of public defenders and other organizations now also publish guides about the collateral consequences of criminal convictions. These resources frequently contain a list of jurisdiction-specific collateral consequences, as well as guidelines for conducting effective intakes.⁹⁶ Other new resources

accused of crimes—if they receive any at all—is a far cry from the constitutional requirement of . . . ‘the guiding hand of counsel at every step in the proceedings,’ which was established by *Gideon v. Wainwright* and its progeny.”)

91. Darryl K. Brown, *Why Padilla Doesn't Matter (Much)*, 58 UCLA L. REV. 1393, 1399 (2011) (“[T]he widespread and routine nature of criminal charging flexibility and the complexity of deportation statutes do not mean that creative lawyers have a range of options for every case.”).

92. *See id.* at 1404–05.

93. *See id.* at 1401 (arguing that, given the gravity of Jose Padilla’s offense—transporting 1000 pounds of marijuana—he is unlikely to be able to negotiate an immigration-safe plea).

94. Some prosecutors make the principled decision not to recharacterize serious charges because of collateral consequences. *See, e.g.*, Memorandum from Jeff Rosen, Dist. Attorney, to Fellow Prosecutors 4 (Sept. 14, 2011), http://www.ilrc.org/files/documents/unit_7b_4_santa_clara_da_policy.pdf [<http://perma.cc/Q243-Q6NZ>] (“[C]ollateral consequences are not a relevant or appropriate factor in any case involving a serious or violent felony . . .”).

95. *See Project Description*, NAT’L INVENTORY OF THE COLLATERAL CONSEQUENCES OF CONVICTION, <http://www.abacollateralconsequences.org/description/> [<http://perma.cc/RZ9V-XTVA>] (last visited Dec. 25, 2015).

96. For a small sampling, see, for example, AM. BAR ASS’N COMM’N ON EFFECTIVE CRIMINAL SANCTIONS & PUB. DEF. SERV. FOR D.C., INTERNAL EXILE: COLLATERAL CONSEQUENCES OF CONVICTION IN FEDERAL LAWS AND REGULATIONS (2009), <http://www.americanbar.org/content/dam/aba/migrated/cecs/internalexile.authcheckdam.pdf> [<https://perma.cc/Y3AW-D9QJ>]; THE BRONX DEFS., *supra* note 45, at 4–5; COLO. STATE PUB. DEF., THE CONSEQUENCES OF CONVICTION: SANCTIONS BEYOND THE SENTENCE UNDER COLORADO LAW (2014); WASH. DEF. ASS’N, BEYOND THE CONVICTION: WHAT DEFENSE ATTORNEYS IN

include comparative “profiles” of the collateral consequences in each jurisdiction,⁹⁷ the first treatise on collateral consequences,⁹⁸ and the 2014 launch of the Collateral Consequences Resource Center, a nonprofit organization devoted to providing information about collateral consequences.⁹⁹ Some states have also begun efforts to collect and reference all collateral penalties in an easily accessible location in the state’s criminal code.¹⁰⁰

These resources represent an important step toward promoting transparency and informed plea bargaining. Though these developments are nascent and face significant hurdles to implementation, they hold the potential to reduce information barriers to identifying and incorporating collateral consequences in the plea bargaining process. The next Part turns to what these dynamics mean for the exercise of prosecutorial discretion.

II. PROSECUTORIAL DISCRETION AND COLLATERAL CONSEQUENCES

Prosecutors have received relatively little attention in the literature on collateral consequences. But they are not indifferent to civil penalties. To the contrary, informed prosecutors have powerful structural incentives to respond to collateral consequences, such as their law enforcement priorities, administrative workloads, relationships with other agencies, interests in achieving horizontal equity and proportionality, or interests in shaping public policy. Prosecutors marshal these rationales to engage in three general approaches: collateral mitigation, collateral enforcement, and the counterbalance model, where prosecutors require the defendant to agree to a harsher criminal penalty in exchange for avoiding a collateral outcome. This Part develops these models. My aim in developing this framework is to show that informed consideration of collateral consequences can lead prosecutors to take divergent approaches and to highlight relevant considerations.

A. COLLATERAL MITIGATION MODEL

In the collateral mitigation approach, prosecutors structure the plea to minimize the likelihood of a collateral sanction. If a prosecutor is aware of the

WASHINGTON STATE NEED TO KNOW ABOUT COLLATERAL AND OTHER NON-CONFINEMENT CONSEQUENCES OF CRIMINAL CONVICTIONS (2013), <http://www.defensenet.org/resources/publications-1/beyond-the-conviction/Beyond%20the%20Conviction%20-Updated%20-%202007.pdf> [<http://perma.cc/7V9T-FN9X>].

97. See Margaret Colgate Love, *Relief from Collateral Consequences and Restoration of Rights: State Profiles*, NAT’L ASS’N OF CRIM. DEF. LAWS., <https://www.nacdl.org/ResourceCenter.aspx?id=25412&libID=25381> [<https://perma.cc/542M-5UR9>] (last visited Feb. 24, 2016) (offering “a collection of individual downloadable documents that profile the law and practice in each U.S. jurisdiction relating to relief from the collateral consequences of conviction”).

98. See MARGARET COLGATE LOVE, JENNY ROBERTS & CECELIA M. KLINGELE, *COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE* (2013).

99. See *About Us*, COLLATERAL CONSEQUENCES RESOURCE CTR., <http://ccresourcecenter.org/about-the-collateral-consequences-resource-center/> [<https://perma.cc/4V2L-SDRM>] (last visited Feb. 24, 2016).

100. Love, *supra* note 71, at 118–21 (describing the reform and stating that Ohio and North Carolina have begun this effort).

potential collateral consequence—its scope, severity, and impact—then the prosecutor exercises her discretion to modify the charges or drop them altogether.¹⁰¹

Administrative efficiency provides a powerful rationale for this approach. Prosecutors in the criminal justice system balance competing roles and interests, including the role of an administrator who seeks “to dispose of each case in the fastest, most efficient manner in the interest of getting his and the court’s work done.”¹⁰² In some cases, if defendants are aware of the collateral consequence, they will turn down a plea they would otherwise accept and opt for a much more time consuming trial.¹⁰³ As the former president of the National District Attorneys’ Association noted, in some cases the only palatable plea for a defendant is one that avoids a collateral penalty.¹⁰⁴ Prosecutors who want to avoid unnecessary administrative burden thus have an incentive to mitigate the collateral consequence.

Prosecutors have incentives to mitigate when the collateral consequence is disproportionate—when it creates a harm that is not justified by any theory of punishment, such as deterrence or retribution. In taking this approach, the prosecutor focuses on the effect the collateral consequence will have on the individual defendant. In exercising discretion, prosecutors weigh familiar equitable considerations. Prosecutors routinely consider factors other than the defendant’s level of culpability and the seriousness of the offense when assessing what penalty is appropriate; they also weigh equitable factors, such as how the penalty will affect the defendant’s ability to work or go to school.¹⁰⁵ As New York County District Attorney Cyrus Vance, Jr. put it, prosecutors are aware that every criminal conviction can have “devastating consequences” for the defendant.¹⁰⁶ A prosecutor who exercises discretion to reduce the collateral consequence is similar to one who makes a sentence concession based on how the

101. Chin & Holmes, *supra* note 5, at 718–19 (discussing how “[i]dentifying and explaining collateral consequences to the prosecutor” may influence whether the prosecutor brings charges at all or the counts to which the prosecution accepts a plea).

102. See Albert W. Alschuler, *The Prosecutor’s Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 52 (1968).

103. Robert M.A. Johnson, *Collateral Consequences*, CRIM. JUST., Fall 2001, at 32.

104. See *id.*

105. Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1706–07 (2010) (“Prosecutors base discretionary bargaining decisions on prior record; employment, familial, and educational status and history; the defendant’s character; and his perceived motivation for this and other criminal acts.”); Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach*, 2 CLINICAL L. REV. 73, 100 (1995) (“To negotiate effectively, defense counsel must . . . personalize or humanize the defendant when talking with the prosecutor. Defense counsel who is unaware or unprepared when the prosecutor inquires about the defendant’s present job status or work history may seriously undermine the effort to obtain a favorable sentencing concession.” (footnote omitted)); see also Alschuler, *supra* note 102, at 53.

106. Cyrus R. Vance, Jr., Dist. Attorney, Keynote Address at the Howard Law Journal Symposium (Oct. 29, 2011), in 54 How. L.J. 539, 543 (2011) (“[I]n any case we handle, the consequences of conviction and sentencing can have devastating consequences for an offender, and even for innocent parties such as the defendant’s family.”).

penalty will impact the defendant. In both cases, the prosecutor assesses whether the impact of the conviction—regardless of whether it is civil or criminal—serves the state’s interest in punishment, or whether it creates too much harm.

Prosecutors who negotiate collateral consequences need not reduce the overall criminal penalty. In the simplest case, the prosecutor makes a “lateral move,” where the criminal penalty remains unchanged.¹⁰⁷ Redundant criminal codes create the possibility of recharacterizing charges in a way that retains the criminal sanction but avoids the collateral consequence. With an immigrant defendant, for instance, the prosecutor could accept a plea for misdemeanor simple assault rather than misdemeanor intentional assault; in criminal law terms, the penalties are equivalent, but only the intentional assault conviction carries the risk of deportation.¹⁰⁸ A prosecutor might also make a minor sentence adjustment, such as a sentence of 364 days rather than one year.¹⁰⁹ The single-day sentence adjustment can avoid categorization as an aggravated felon for immigration purposes, and thus avoid removal.¹¹⁰

If prosecutors view collateral consequences as disproportionate, they may also make a downward adjustment or drop the charges altogether.¹¹¹ Given the choice of withholding penalties altogether or triggering disproportionate ones, some prosecutors make the principled decision to choose no punishment. This dynamic occurs when the only available sentences are too severe; prosecutors must choose between “overkill”—inflicting unjustifiably severe sanctions—and “nullification”—imposing no sanctions when some penalty is justified.¹¹² McGregor Smyth, the former head of the Bronx Defenders’ civil advocacy project, describes this dynamic in practice and explains that in some cases, prosecutors view the nullification approach as the only option that comports

107. See Heidi Altman, *Prosecuting Post-Padilla: State Interests and the Pursuit of Justice for Noncitizen Defendants*, 101 GEO. L.J. 1, 23 (2012); Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. REV. 1126, 1188 (2013) (discussing lateral moves in the immigration context).

108. See *In re Solon*, 24 I. & N. DEC. 239, 244–45 (B.I.A. 2007) (explaining that intentional assault is considered a crime of “moral turpitude” but simple assault is not); see also Altman, *supra* note 107, at 23 (describing defense interventions aimed at reaching an immigration-safe lateral move).

109. See Altman, *supra* note 107, at 23. Other actors also make these types of modifications to disrupt immigration consequences. See, e.g., *State v. Quintero Morelos*, 137 P.3d 114, 116 (Wash. Ct. App. 2006) (sentencing judge reduced sentence from 365 days to 364 days to avoid deportation). Recently, the state of California modified its criminal code to define a misdemeanor as punishable by a maximum of 364 days so as to avoid the prospect of mandatory deportation following a relatively minor offense. S.B. 1310, 2013–2014 S., Reg. Sess. (Cal. 2014) (creating CAL. PENAL CODE § 18.5 (West 2015), which reads: “Every offense which is prescribed by any law of the state to be punishable by imprisonment in a county jail up to or not exceeding one year shall be punishable by imprisonment in a county jail for a period not to exceed 364 days.”).

110. See 8 U.S.C. § 1101(a)(43)(G) (2012); *United States v. Christopher*, 239 F.3d 1191, 1194 (11th Cir. 2001).

111. Chin & Holmes, *supra* note 5, at 719 (citing examples of guidance illustrating how “[t]he impact of collateral consequences due to a criminal conviction can, on occasion, be used to persuade the prosecutor to prosecute for a lesser charge or to decline a case altogether”).

112. Allen, *supra* note 58, at 739.

with basic principles of fairness. He writes, “In our experience, prosecutors and judges respond best to consequences that offend their basic sense of fairness—consequences that are absurd or disproportionate, or that affect innocent family members.”¹¹³ He offers this example of a successful negotiation:

Juan R. was charged with a drug crime, and the prosecutor refused to agree to any plea below a misdemeanor. Juan, however, was disabled and lived in public housing, and a misdemeanor would result in his eviction. Knowing the public housing rules on termination for criminal activity, the defense attorney convinced the prosecutor to consent to a non-criminal disposition, and Juan kept his home.¹¹⁴

Some prosecutors issue office-wide guidance for engaging in collateral mitigation in the interests of justice.¹¹⁵ A 2011 memorandum distributed to prosecutors in Santa Clara County, California, cites *Padilla* as supporting a “dominant paradigm” that “prosecutors should consider both collateral and direct consequences of a settlement in order to discharge our highest duty to pursue justice.”¹¹⁶ The American Bar Association (ABA) Standards for Criminal Justice on Collateral Sanctions and Disqualification of Convicted Persons also offers guidance to this effect. It indicates that sentencing courts ought to consider “applicable collateral sanctions in determining an offender’s overall sentence.”¹¹⁷ The commentary further explains that “the sentencing court should ensure that the totality of the penalty is not unduly severe and that it does not give rise to undue disparity.”¹¹⁸

It is important to note that prosecutors who adopt this approach may not see themselves as making a choice between no punishment and disproportionate penalties. Kohler-Hausmann, for instance, observed a collateral mitigation dy-

113. Smyth, *Holistic Is Not a Bad Word*, *supra* note 7, at 494–95 (describing the approach of the Bronx Defenders); *see also* Altman, *supra* note 107, at 3–4, 35 (describing advocacy strategy focused on presenting deportation as an unjust and disproportionate penalty for a marijuana conviction).

114. Smyth, *Holistic Is Not a Bad Word*, *supra* note 7, at 495.

115. Formal policies are relatively rare. Eagly, *supra* note 107, at 1154 & n.104 (reporting that out of fifty requests for policies to county prosecutor offices with the highest noncitizen counts in their criminal justice systems, only seven reported adopting a formal policy that expressly permits prosecutors to consider immigration consequences of conviction, and two county prosecutor offices (Cochise, Arizona and San Mateo, California) reported adopting policies that “explicitly prohibit prosecutors from considering immigration status or future deportation during the course of plea bargaining”); Kay L. Levine & Ronald F. Wright, *Prosecution in 3-D*, 102 J. CRIM. L. & CRIMINOLOGY 1119, 1133–34 (2012) (discussing the lack of formal policies within prosecutors’ offices relative to larger law firms or administrative agencies).

116. Memorandum from Jeff Rosen, Dist. Attorney, to Fellow Prosecutors, *supra* note 94, at 2 (emphasis omitted); *see also* Altman, *supra* note 107, at 26 (discussing the Santa Clara memorandum).

117. AM. BAR ASS’N STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS STANDARD 19-2.4(a), at 3 (3d ed. 2004); *see also* Chin & Holmes, *supra* note 5, at 697.

118. ABA STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS standard 19-2.4 cmt., at 29–30 (3d ed. 2004).

namic in New York misdemeanor courts, but she suggests that prosecutors fold an awareness of the collateral consequence into their initial assessment of the case.¹¹⁹ Prosecutors exercise discretion both by offering substantively better deals and by using their power over the clock to offer speedier dispositions if the criminal case is creating a barrier to employment. She writes:

Many criminal justice actors are cognizant of the potential collateral consequences of even the most minor and short-lived markers. Debbie, a longtime supervisor in the D.A.'s office, explained: "A huge factor that we always take into consideration is whether or not the person is employed. We don't want to see people losing their jobs, especially not in today's economy. We do not penalize someone for not having a job, but it certainly is a plus and we always take it into consideration in forming dispositions."¹²⁰

In terms of end results, the approach taken by Debbie, the prosecutor, is the same as that taken by the prosecutor in the case of Juan R., the disabled defendant in public housing. Both prosecutors found the collateral penalty disproportionate and unjustified. But Debbie does not view her office as changing its standard practice in response to disproportionate collateral consequences. Rather, the standard practice is designed to adapt to collateral consequences. This approach illustrates how deeply embedded collateral penalties can be in a system of plea bargaining. Although collateral consequences are not imposed until after the criminal conviction has been entered, awareness of the civil penalties can influence prosecutorial behavior at the outset of their decision-making process.

In an important comparative study, Ingrid Eagly found significant variation in how criminal justice officials—prosecutors, defense lawyers, judges, jail personnel, and others—approach immigration outcomes in three of the nation's highest volume urban sites for criminal immigration enforcement.¹²¹ In Los Angeles, for instance, criminal justice officials do not make an affirmative effort to learn about immigration status. Police do not inquire about immigration violations, judges do not ask about immigration status, and prosecutors do not purposefully pull immigration information.¹²² But, with regard to plea bargaining, a "central piece" of the approach is that prosecutors take into account collateral consequences.¹²³ For over a decade, deputy prosecutors have been authorized to depart from standard plea bargains in minor cases if defendants will experience

119. See Kohler-Hausmann, *Misdemeanor Justice*, *supra* note 35, at 373.

120. *Id.*

121. See Eagly, *supra* note 107, at 1131–35 (identifying three distinct approaches to immigration status, characterized as "alienage-neutral," "illegal-alien-punishment," and "immigration-enforcement" in Los Angeles County, California, Harris County, Texas, and Maricopa County, Arizona, respectively).

122. *Id.* at 1157.

123. *Id.* at 1163.

consequences such as deportation or the loss of a professional license.¹²⁴ Prosecutors include the collateral consequence alongside other factors, such as prior criminal history and significance of the charged offense, in exercising discretion.¹²⁵

In addition to administrative efficiency and proportionality incentives, prosecutors also have core law enforcement-related incentives to mitigate. This approach views mitigation as part of a broader strategy designed to encourage community members to come forward, report crime, serve as witnesses, and cooperate with law enforcement.¹²⁶ This conception of crime control is grounded in the vision that law enforcement works best when communities view law enforcement as responsive to their concerns.¹²⁷ In the past two decades, law enforcement strategies designed to promote local trust and cooperation with police and prosecutors have come under the general label of “community prosecution” and “community policing.” These strategies seek to identify and respond to the public safety concerns of local communities.¹²⁸ The approach focuses on preventing as well as punishing crime, and it depends on strategies such as reaching out to businesses, schools, and community associations.¹²⁹ The theory is that if communities see law enforcement as responsive to their concerns, they are more likely to obey the law and help enforce it.¹³⁰

Prosecutors who adopt this approach consider whether a collateral penalty that puts a defendant out of work or triggers deportation harms the relationship between law enforcement and the community. Some local law enforcement agencies cite precisely these types of concerns when opposing federal efforts to tie immigration enforcement to local policing decisions. As one police leader testified before Congress, “To do our job we must have the trust and respect of the communities we serve. . . . When immigrants come to view their local [law enforcement agencies] with distrust because they fear deportation, it creates conditions that encourage criminals to prey upon victims and witnesses alike.”¹³¹

124. *Id.* at 1163–64 (discussing immigration consequences and noting that prosecutors adopt a similar approach for licensing).

125. *Id.* at 1164–65.

126. See Kay L. Levine, *The New Prosecution*, 40 WAKE FOREST L. REV. 1125, 1151 (2005) (“In jurisdictions committed to the new prosecution model, the goals of the prosecutors’ office include . . . reducing and preventing crime, addressing public disorder and misdemeanor offenses, and strengthening bonds with citizens.”).

127. See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 3–4 (1990) (distinguishing an instrumental view of obedience—people obey the law because they fear getting caught—from the view that people obey the law because they believe it is procedurally fair).

128. See Thomas J. Miles, *Does the “Community Prosecution” Strategy Reduce Crime? A Test of Chicago’s Experience*, 16 AM. L. & ECON. REV. 117, 118, 123 (2014).

129. *Id.* at 121–22.

130. See Tracey L. Meares, *Praying for Community Policing*, 90 CALIF. L. REV. 1593, 1629–30 (2002) (“[I]deal community-policing officers are flexible generalists willing to help community residents solve crime problems or other noncrime problems that residents believe to lead to unsafe conditions in their neighborhoods.”).

131. *Oversight of the Administration’s Misdirected Immigration Enforcement Policies: Examining the Impact on Public Safety and Honoring the Victims: Hearing Before the S. Comm. on the Judiciary*,

On a related note, prosecutors have incentives to mitigate when the collateral consequence itself is criminogenic. The former District Attorney of Kings County, Brooklyn, explained his decision to support efforts to provide former inmates with access to social services as grounded in the “ultimate” law enforcement goal of increasing public safety.¹³² Alameda County District Attorney Nancy O’Malley endorsed the collateral mitigation approach as creating potential “to help people stay or get into a position where they have the ability to be successful.”¹³³ Prosecutors who view lack of access to jobs or housing as root causes of crime regard collateral mitigation as a necessary strategy for crime control.

In practice, these motivations likely overlap with public policy incentives. Prosecutors who believe that collateral consequences promote crime likely also believe that the collateral consequence amounts to bad public policy. They can use their control over the plea bargaining process to disrupt public policy outcomes with which they disagree.¹³⁴ Debbie, the prosecutor who notes that prosecutors “don’t want to see people losing their jobs, especially not in today’s economy,”¹³⁵ could be seen as taking a public policy position—access to jobs is desirable for the economy—and also taking the position that the penalty is disproportionate.

Public policy motives can also be distinct from other considerations. The prosecutor’s control over the criminal justice process allows for enforcement decisions that align with the prosecutor’s public policy preferences, even if they are not linked to any particular law enforcement rationale.

B. COLLATERAL ENFORCEMENT MODEL

The collateral enforcement approach is the mirror image of the mitigation model. In this model, prosecutors regard the noncriminal consequence as a desirable end. Prosecutors structure pleas to maximize the likelihood of deportation, eviction, or loss of a professional license. Prosecutors may also take other measures to trigger a collateral consequence, such as contacting civil law enforcement authorities and working to initiate civil administrative enforcement

114th Cong. 84 (2015) (statement of Tom Manger, Chief of Police, President of the Major Cities Chiefs Association); see also Bill Ong Hing, *Immigration Sanctuary Policies: Constitutional and Representative of Good Policing and Good Public Policy*, 2 U.C. IRVINE L. REV. 247, 252, 254–55 (2012) (citing examples of policing initiatives designed to reduce the likelihood of deportation); Juliet P. Stumpf, *D(e)volving Discretion: Lessons from the Life and Times of Secure Communities*, 64 AM. U. L. REV. 1259, 1272–73 nn.47–48 (2015) (describing local law enforcement resistance to the now-defunct federal immigration initiative Secure Communities).

132. Charles J. Hynes, *ComALERT: A Prosecutor’s Collaborative Model for Ensuring a Successful Transition from Prison to Community*, 1 J. CT. INNOVATION 123, 125 (2008).

133. NAT’L ASS’N OF CRIMINAL DEF. LAWYERS, *COLLATERAL DAMAGE: AMERICA’S FAILURE TO FORGIVE OR FORGET IN THE WAR ON CRIME* 25 (2014), <http://www.nacdl.org/restoration/roadmapreport/> [<http://perma.cc/PK7X-PAXS>].

134. See Hing, *supra* note 131, at 303–04 (discussing policing practices designed to reduce the likelihood of deportation as constituting both good public policy and good policing).

135. Kohler-Hausmann, *Misdemeanor Justice*, *supra* note 35, at 373.

proceedings after an arrest. In taking the collateral enforcement approach, prosecutors might seek out information about the defendant's public benefits or immigration status, and they might leverage the plea bargaining process to induce defendants to waive protections that are intended to apply in civil administrative proceedings.¹³⁶

The enforcement approach has received relatively little attention in the academic literature on collateral mitigation. But prominent examples exist. Maricopa County prosecutors in Arizona, for instance, adopt a "no-amnesty" approach to immigration enforcement. Police officers pull immigration status information at the time of arrest and prosecutors then choose among potential charges with the objective of increasing the likelihood of obtaining convictions that carry immigration consequences.¹³⁷ Public housing evictions provide another example. Some police and prosecutors focus on combatting crime in public housing complexes.¹³⁸ New York City takes the additional step of allowing prosecutors to facilitate—and in some cases initiate—housing evictions.¹³⁹ If a landlord elects not to initiate eviction proceedings, the Narcotics Eviction Program permits prosecutors to pursue evictions directly.¹⁴⁰ The goal is to provide for speedy evictions and convictions.

Some prosecutors regard collateral enforcement as falling within their core law enforcement duties. Collateral consequences can deter future criminal activity. The most clear examples are cases where the collateral consequence is closely related to the criminal act, such as restrictions on firearm ownership after a gun-related crime¹⁴¹ or bans on holding public office after the defendant

136. In the immigration context, for instance, federal prosecutors may offer plea deals that require defendants to stipulate to removal. See Julia Preston, *270 Immigrants Sent to Prison in Federal Push*, N.Y. TIMES (May 24, 2008), <http://www.nytimes.com/2008/05/24/US/24immig.html> [<http://perma.cc/8Z A7-KP2H>] (discussing a 2008 prosecution of close to 300 factory workers in Postville, Iowa, where federal prosecutors threatened to bring more serious charges unless the defendants stipulated to their removability); see also Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW. U. L. REV. 1281, 1303–04 (2010) (discussing how the Postville defendants who stipulated to removal abandoned their ability to take advantage of various immigration law measures that may have provided relief from removal).

137. Eagly, *supra* note 107, at 1187–88.

138. See *Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 127 (2002) (discussing the Anti-Drug Abuse Act of 1988, which responded to drug dealers who "increasingly impos[ed] a reign of terror on public and other federally assisted low-income housing tenants").

139. See, e.g., *Escalera v. N.Y. Hous. Auth.*, 924 F. Supp. 1323, 1331 (S.D.N.Y. 1996) (discussing how the "Bawdy House" laws have been used by the Narcotics Eviction Program to lead to speedy evictions).

140. For a discussion of the Narcotics Eviction Program, see Jeffrey Fagan et al., *The Paradox of the Drug Elimination Program in New York City Public Housing*, 13 GEO. J. POVERTY L. & POL'Y 415, 425 (2006) (describing the NYPD's Anti-Narcotics Strike Force as receiving funding to "support special prosecution activities primarily to evict tenants with drug arrests"); Scott Duffield Levy, *The Collateral Consequences of Seeking Order Through Disorder: New York's Narcotics Eviction Program*, 43 HARV. C.R.-C.L. L. REV. 539, 545–47 (2008).

141. See Uggen & Stewart, *supra* note 55, at 1872 (describing merited restrictions as including those "tailored to particular offenses or individuals").

has abused a position of power.¹⁴² But collateral consequences also open the door to enforcement actions that have, at best, an attenuated relationship to crime control.

Consider New York City's Narcotics Eviction Program. The program is part of a broader effort by police and prosecutors to target crime in large public housing complexes. Police officers provide dedicated patrol services to public housing authorities,¹⁴³ and they have the authority to arrest anyone with certain prior felony drug arrests if they enter public housing or adjacent property.¹⁴⁴ The goal may be to focus on the most dangerous tenants. But prosecutors who process such arrests might come to regard their agenda as encompassing the broader goal of keeping people with criminal records—or those whom they view as likely to engage in criminal activity—out of public housing.

Community policing rationales might favor collateral enforcement.¹⁴⁵ The New York County District Attorney's Office points squarely to such rationales in explaining its approach to evictions. Prosecutors encourage community members to anonymously report criminal activity, and they respond to complaints by making arrests and by arranging for police officers to serve as

142. Prosecutors not uncommonly include resignation from public office in the terms of the plea itself. *See, e.g.*, Kim Chandler, *Alabama Rep. Greg Wren Pleads Guilty to Ethics Violation, Resigns*, TUSCALOOSA NEWS (Apr. 1, 2014, 12:00 PM), <http://www.tuscaloosaneews.com/article/20140401/NEWS/140409988> [<http://perma.cc/A7GD-87B7>] (immediate resignation from public office as condition of plea agreement); Richard Fausset, *Harrell, South Carolina House Speaker, Pleads Guilty*, N.Y. TIMES (Oct. 23, 2014), <http://www.nytimes.com/2014/10/24/us/south-carolina-bobby-harrell-campaign-finance.html> [<http://perma.cc/C4PG-DHKD>] (public official agrees to immediately resign and not to run for public office for a period of three years).

143. In 2013, the New York City Housing Authority (NYCHA)—the country's largest housing authority—paid the NYPD approximately \$70 million for a dedicated police force to patrol its large complexes. Mireya Navarro & Joseph Goldstein, *Policing the Projects of New York City, at a Hefty Price*, N.Y. TIMES (Dec. 26, 2013), <http://www.nytimes.com/2013/12/27/nyregion/policing-the-projects-of-new-york-city-at-a-hefty-price.html> [<http://perma.cc/X8WQ-2LLW>].

144. N.Y.C. HOUS. AUTH., TRESPASS POLICY FOR FELONY DRUG ARRESTS § III (2005), http://www1.nyc.gov/html/nycha/downloads/pdf/trespass_policy.pdf [<http://perma.cc/97L9-XB6B>]. There are exemptions, such as for residents or for those whose arrests have ultimately been dismissed. It is the arrested individual's burden to show she fits into an exemption. But in practice, individuals may not know about the exemptions or may lack the practical ability to challenge an exclusion. *See* Manny Fernandez, *Barred from Public Housing, Even to See Family*, N.Y. TIMES (Oct. 1, 2007), <http://www.nytimes.com/2007/10/01/nyregion/01banned.html> [<http://perma.cc/47X6-584N>] (discussing a newsletter that prints the names of barred individuals—the “Not Wanted List”—and describing families who were unaware of the appeal procedure).

145. *See, e.g.*, Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of Chicago v. Morales*, 1998 U. CHI. LEGAL F. 197, 208 (stressing the importance of enabling “minority communities [to] us[e] their new political power to take charge of the crime problems that plague their neighborhoods”). For debate about the merits of this approach in the context of a whether community members should be able to cede their rights to be free from unlawful searches in the interest of crime control, see Tracey L. Meares & Dan M. Kahan, *Forum: When Rights Are Wrong*, BOS. REV., Apr. 1, 1999, <http://bostonreview.net/forum/tracey-l-meares-dan-m-kahan-when-rights-are-wrong> [<http://perma.cc/X8XF-9MGV>].

witnesses in eviction proceedings where necessary.¹⁴⁶ The District Attorney's Office presents this approach as responsive to the concerns of residents, landlords, and block associations who are victimized by crime.¹⁴⁷

Prosecutors also have incentives to take the enforcement approach when it promotes valuable relationships with civil law enforcement partners, particularly through the use of additional street-level enforcement agents. Prosecutors routinely communicate with and share enforcement personnel with actors whose formal role is civil but who operate to supplement criminal law enforcement efforts. In the immigration context, for instance, criminal prosecutors can work closely with immigration enforcement officials to identify "criminal aliens"—deportable noncitizens who also have a criminal record.¹⁴⁸ Criminal prosecutors have incentives to develop strong relationships with the civil enforcement actors they view as allies.¹⁴⁹ Alliances between criminal and immigration enforcement officials give prosecutors access to more enforcement personnel. Immigration enforcement officials also can assist prosecutors by sharing evidence gathered in immigration-related interviews in immigration raids.¹⁵⁰ Prosecutors who structure pleas to maximize the likelihood of deportation or eviction might further cement these relationships and maintain prospects for future cooperation and information sharing.

Relatedly, prosecutors who enforce collateral consequences may gain the opportunity to take advantage of additional forums for discovery, particularly where the civil proceeding goes forward before the criminal case. Defendants who are arrested might face eviction, administrative termination, or license revocation proceedings while the criminal case is pending.¹⁵¹ Testimony generated in these types of proceedings, such as about the circumstances underlying an arrest, may provide relevant evidence in the criminal case.¹⁵²

Collateral enforcement can also assist prosecutors in disposing of cases more efficiently. Prosecutors who appropriate the threat of collateral consequences as leverage in negotiations have more bargaining power overall. Scholars and

146. See N.Y. CTY. DIST. ATTORNEY'S OFFICE, TRESPASS AFFIDAVIT AND NARCOTICS EVICTION PROGRAMS (2010), http://manhattanda.org/sites/default/files/Trespass_Affidavit_0.pdf [<http://perma.cc/GY8A-5MAN>].

147. See *id.*

148. See, e.g., Jennifer M. Chacón, *Whose Community Shield?: Examining the Removal of the "Criminal Street Gang Member,"* 2007 U. CHI. LEGAL F. 317, 320 (criticizing vague standards and overbroad definitions of "criminal aliens" in the context of gang membership); Eagly, *supra* note 107, at 1139–43 (discussing various categories of noncitizens who could be classified "criminal aliens").

149. See Chacón, *supra* note 148, at 320 (describing cooperation between criminal law enforcement officials and immigration enforcement officials that is aimed both prosecuting and removing suspected noncitizen gang members); Eagly, *supra* note 136 (focusing on federal cooperation between immigration enforcement officials and criminal prosecutors).

150. See, e.g., Eagly, *supra* note 136, at 1308–17.

151. See Smyth, *Holistic Is Not a Bad Word*, *supra* note 7, at 481.

152. For an explanation of how prosecutors might gather evidence in eviction cases that are brought by landlords under the Narcotics Eviction Program, see *id.* at 496.

courts have documented how prosecutors leverage broad criminal laws, jail time pending trial, and the threat of enhanced criminal charges to secure plea agreements and persuade defendants to waive procedural protections.¹⁵³ Collateral consequences are no different. A prosecutor might threaten to pursue charges that carry collateral consequences just as the prosecutor might stack criminal charges (including disproportionate ones) to secure the plea.¹⁵⁴ A defendant who places a premium on avoiding deportation will be well-advised to accept an immigration-safe plea if the alternative conviction risks deportation. This approach presents the same fairness problems as leveraging disproportionate criminal penalties to obtain a plea, but it is even harder to monitor given that the formal criminal penalty itself may well be appropriate.¹⁵⁵

Prosecutors might view collateral consequences as a more administratively efficient substitute for serious criminal sanctions. A prosecutor deciding to pursue a serious conviction may need to invest more resources in investigation and trial preparation. Civil penalties that attach to low-level offenses, on the other hand, impose no additional administrative burdens. This approach can also save costs for corrections as a whole. Prosecutors who take this approach may find that it allows them to take more cases overall and also avoids costs associated with incarceration.

Collateral enforcement allows prosecutors to do an end-run around the safeguards of criminal procedure. If the prosecutor believes the defendant deserves a steeper punishment but lacks the evidence or the resources to investigate and prove the more serious criminal charges, the prosecutor may appropriate the collateral consequence for retributive reasons. Prosecutors can enforce collateral consequences where they lack the evidence, the administrative capacity, or merely the inclination to pursue more serious criminal charges. They can seek collateral consequences if they want to achieve a greater level of punishment than is available under the criminal law. Prosecutors who view immigration enforcement as too lax can also enforce collateral consequences to achieve their preferred public policy outcomes. Prosecutors act within the scope of their legal discretion in enforcing collateral consequences for any of these reasons, as long as there is sufficient legal basis for the criminal conviction.

153. See *United States v. Mezzanatto*, 513 U.S. 196, 210 (1995) (permitting defendant to waive immunity provided by the Federal Rules of Evidence in exchange for a plea); Barkow, *supra* note 18, at 879 (discussing legal doctrine that permits prosecutors to threaten more serious charges if the defendant exercises her right to trial); David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1744 (1993) (“Prosecutors can multiply charges or overcharge defendants in order to generate tradable items.”); Alexandra Natapoff, Gideon *Skepticism*, 70 WASH. & LEE L. REV. 1049, 1064 (2013); Wesley MacNeil Oliver, *Toward a Common Law of Plea Bargaining*, 102 KY. L.J. 1, 48 (2013–2014).

154. See DAVIS, *supra* note 18, at 19–41 (discussing prosecutorial discretion in the charging and plea bargaining process); Lynch, *supra* note 18, at 40.

155. See *United States v. Kupa*, 976 F. Supp. 2d 417, 419–20 (E.D.N.Y. 2013).

C. COUNTERBALANCE MODEL

Collateral consequences create incentives for prosecutors to substitute criminal and civil sanctions to find the appropriate penalty.¹⁵⁶ Prosecutors seek a higher criminal penalty in exchange for avoiding a collateral consequence. The price of an immigration-safe deal might be “pleading up” to a more serious crime or serving a longer criminal sentence that does not trigger deportation.¹⁵⁷

Prosecutors might take this approach because they want to treat like defendants alike.¹⁵⁸ When prosecutors mitigate, they may give some defendants less punishment than other similarly culpable defendants based solely on the collateral consequence. This creates the potential for bias, both perceived and actual. The concern is that prosecutors will exercise discretion based on their own personal sympathies, rather than based on considerations about culpability. Stiffer criminal penalties in exchange for a better collateral outcome can offset the perception of favoritism. Prosecutors may also take this approach when they believe some punishment is justified but there are no equivalent charges that avoid the collateral penalty. Thus, prosecutors seek a higher penalty—one that may even impose more punishment than the prosecutor believes is necessary—as the price of avoiding the collateral consequence.

Counterbalancing also provides a quick way of authenticating collateral penalties. During the plea bargaining process, prosecutors should seek to verify information presented by the defendant.¹⁵⁹ But authentication takes time, particularly when the relevant information falls well outside the prosecutor’s area of expertise. The threat of a steeper criminal law penalty can serve as a rough proxy for verification. The Santa Clara District Attorney’s Office endorses this approach, on a case by case basis, along with the collateral mitigation approach. In a manual that notes the practical difficulties in verifying whether a collateral

156. This dynamic occurs outside the context of plea bargaining as well. For instance, some states allow noncitizen defendants to shorten prison sentences by agreeing to deportation. Eagly, *supra* note 107, at 1190 (discussing Maricopa’s law allowing convicted noncitizen defendants to shorten prison sentences by half if they agree to deportation as part of a broader strategy to maximize removals).

157. See, e.g., *Lopez v. Jenkins*, No. 08cv0457, 2009 WL 4895274, at *2 (S.D. Cal. Dec. 10, 2009) (“These bargains are called ‘upward pleas’ because they are pleas to more serious offenses that carry lengthier custodial sentences; the upside is the reduction or elimination of collateral consequences, such as the loss of one’s asylum status.”); *People v. Bautista*, 8 Cal. Rptr. 3d 862, 870 (Cal. Ct. App. 2004) (discussing expert testimony that offering to “plead up” to a higher charge is a standard way to attempt to avoid certain immigration penalties); Josh Bowers, *Two Rights to Counsel*, 70 WASH. & LEE L. REV. 1133, 1136–37 (2013) (describing a former client who successfully offered to plead guilty to a misdemeanor rather than a less serious noncriminal “violation” to avoid immigration penalties); Jenny Roberts, *Proving Prejudice, Post-Padilla*, 54 How. L.J. 693, 697 (2011) (“[T]he bargained-for sentence might actually be longer in exchange for a charge bargain that allows the defendant to avoid imposition of the collateral consequence.”).

158. See *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987) (discussing the “the principle of treating similarly situated defendants the same”); David Gray, *Punishment as Suffering*, 63 VAND. L. REV. 1619, 1620 (2010) (discussing the view that “[w]e punish more serious crimes more severely and aim to inflict the same punishment on similarly situated offenders who commit similar crimes”).

159. See Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1971 (1992) (“[Prosecutors] seek not to verify ‘innocence’ but to verify information.”).

consequence is genuine, it urges prosecutors to structure pleas to include “additional custody time to compensate for any shift in charge.”¹⁶⁰ This practice is designed to make it “very unlikely that anyone would accept the offer unless they were actually facing the claimed collateral consequence.”¹⁶¹

Prosecutors might also take this approach to discourage gamesmanship and to manage relationships with defense counsel. Some defense attorneys are part of a close-knit bar and share advocacy strategies.¹⁶² Repeat players are likely to ask for a better deal if it has been offered in the past.¹⁶³ Prosecutors who mitigate run the risk of setting a soft “precedent”; defense attorneys could routinely ask prosecutors to pursue less severe sanctions or drop them altogether regardless of whether the defendant actually faces the collateral consequence.¹⁶⁴ Ronald F. Wright and Kay L. Levine found in a recent interview-based study that newer prosecutors reported concern with developing their reputation and not “being intimidated, outmaneuvered, ‘eat[en]’ or ‘run over’” by more experienced defense attorneys.¹⁶⁵ This, in turn, leads to their taking more rigid, tougher negotiating positions than more experienced prosecutors. Similarly, the counter-balance approach can function as a way to offset prosecutorial anxieties about being taken advantage of in the negotiation process.

D. REFINEMENTS

Before turning to the implications of these approaches, a few clarifications are in order. First, it is my hope that this framework will be of use in shaping further empirical work about the process of plea bargaining in light of collateral consequences. At this point, other than to demonstrate support for each of these models in practice, I make no claims about how often these approaches occur relative to each other. Rather, I seek to emphasize that the considerations that matter to prosecutors are different—and far more complex—than has thus far been appreciated.

Second, parties who are involved in the negotiation may have difficulty gauging the actual motivations at issue. Parties may not be transparent in their stated approach. A prosecutor might have strategic reasons for stating that she is willing to agree to a deal because she recognizes that a collateral penalty is disproportionate when, in fact, she simply seeks to dispose of the case quickly. Prosecutors might also not recognize their own practices. A prosecutor might believe she takes a mitigation approach when considering the issue in the

160. Memorandum from Jeff Rosen, Dist. Attorney, to Fellow Prosecutors, *supra* note 94, at 5.

161. *Id.*

162. Oliver, *supra* note 153, at 14–15 (describing criminal defense practices as nonhierarchical and focused on mentorship and information sharing).

163. Bibas, *supra* note 22, at 2534 (discussing the advantages of defense counsel who are “repeat players”).

164. See MILTON HEUMANN, PLEA BARGAINING 24–33, 156–57 (1978).

165. Wright & Levine, *supra* note 18, at 1092 (alteration in original); see also Easterbrook, *supra* note 159, at 1971 (“Members of the criminal defense bar are in constant contact with local prosecutors. Reputations are valuable in markets characterized by repeat dealing.”).

abstract but take a different approach in practice.¹⁶⁶

Third, prosecutors take different approaches depending on the type of collateral consequence. The same prosecutors who take an enforcement approach to public housing evictions, for instance, might be willing to mitigate criminal penalties that trigger immigration consequences. Prosecutors might see enforcement of evictions as a way to reduce crime in large public housing complexes, but they might see mitigating the likelihood of deportation as the best way to build trust and cooperation with immigrant communities. Prosecutors might also take different approaches depending on their relationships with various civil law agencies or on their internal office structure.¹⁶⁷ Prosecutors might also be willing to take a mitigation approach if there is an equivalent criminal charge they can pursue that does not trigger the collateral consequence, but they might take the counterbalance approach if there is no reasonably available lateral move.

These models are analytically useful in demonstrating the range of potential approaches to collateral consequences. Pulling apart prosecutorial motivations is necessary to analyze the work that collateral consequences might be doing within the plea bargaining system. The next Part turns to the implications of these dynamics.

III. IMPLICATIONS

Collateral consequences extend prosecutors' largely unreviewable discretion to an array of legal consequences, regulatory policies, and public interests. As the *Padilla* majority noted, this dynamic can serve the mutual interests of the parties. Prosecutors can structure pleas to achieve outcomes they believe are fair, proportionate, and that serve law-enforcement ends while also allowing defendants the opportunity to secure sanctions at the lowest cost to themselves. After an arrest, plea bargaining might also be a defendant's only opportunity to avoid an otherwise mandatory collateral penalty.¹⁶⁸

But this discretion comes with a cost. Prosecutors necessarily gain the ability to selectively and inconsistently appropriate collateral consequences as a source of leverage or for retributive ends. Prosecutorial decision making in light of collateral consequences can compromise law enforcement legitimacy, and it can also disrupt the goals of civil regulators. This Part discusses the implications of prosecuting collateral consequences along these dimensions.

166. See Altman, *supra* note 107, at 28–31 (noting that of the 185 prosecutors who completed a survey distributed in Kings County, Brooklyn, slightly more than 53% reported that they would mitigate in the abstract, but 46% reported doing so in practice).

167. For a recent discussion of how internal office organization may affect prosecutorial behavior, see Levine & Wright, *supra* note 115.

168. See Lee, *supra* note 69, at 556 (noting that plea bargaining may be the best opportunity for a noncitizen defendant to avoid removal).

A. SELECTIVE ENFORCEMENT OF COLLATERAL CONSEQUENCES

Thus far, commentators have tended to focus on whether prosecutors mitigate.¹⁶⁹ But an equally important question is why prosecutors mitigate. The desire to offset an unjustified harm is distinct from the desire for administrative efficiency, even if the outcomes are the same. The former approach reflects a judgment about how to balance law enforcement goals with achieving proportional outcomes. When the only available conviction will trigger disproportionate state-imposed harm—regardless of whether it is civil or criminal—prosecutors make the principled decision to pursue different charges or drop the charges altogether. They may take this approach even if they determine that some level of criminal punishment is justified.

By contrast, prosecutors who mitigate because it is administratively efficient make judgments that reflect their own personal commitments and institutional capacity. Pleas reflect workloads, rather than abstract concerns about culpability. This occurs in the context of criminal sentences as well, of course. But when collateral consequences come into play, the stakes of this decision can reach well beyond the relatively minor criminal penalty that is formally at issue. Major civil outcomes such as deportation can turn on whether the prosecutor has the time to pursue a relatively minor criminal offense. Prosecutors who focus on efficiency rationales also make no principled commitments in terms of how they respond to civil penalties. They may be just as likely to selectively enforce collateral consequences, such as by using the threat of a collateral consequence as leverage to secure a collateral-safe plea, as they are to drop charges if the defendant insists on going to trial.

Prosecutors who leverage the threat of a collateral consequence to secure a plea are similar to those who threaten steeper criminal penalties if defendants exercise their right to trial or those who deliberately draw out the misdemeanor process as a source of leverage.¹⁷⁰ But enforcement of collateral consequences represents an even less visible exercise of prosecutorial discretion. The impact of prosecutorial discretion cannot be measured by looking at charging decisions, dispositions, or sentence lengths alone.

Prosecutors who enforce collateral consequences may also gain the capacity to pursue marginal cases that they would otherwise dismiss. As Darryl Brown notes, as a general matter, prosecutors who have the ability to substitute less costly procedures for more expensive ones can bring the criminal process to bear on a larger population.¹⁷¹ A system of plea bargaining thus allows prosecutors to pursue more cases than a system of trials.¹⁷² Collateral consequences triggered by low-level convictions that substitute for what would otherwise be

169. *See supra* note 7 and accompanying text.

170. *See supra* notes 28–32 and accompanying text (discussing the process costs imposed by lengthy delays in misdemeanor courts).

171. Brown, *supra* note 26, at 186.

172. *See id.*

more serious criminal convictions build the criminal justice system's capacity. This, in turn, may lead to more criminal caseloads overall, reaching well beyond the point that is considered optimal.¹⁷³

Selective enforcement of collateral consequences has the potential to expand the scope of prosecutorial discretion in other ways. Prosecutors do not simply react to information presented during plea discussions; in some cases, as in the Maricopa example, prosecutors actively seek out information about the defendant's immigration status or work status, which then informs how they exercise discretion. Depending on the context, this dynamic might be justified by clearly defined law enforcement objectives. It may even lead to more proportionate, tailored punishments. Whether this actually follows, however, depends on a number of variables, such as the goals of the prosecutor's office, the community's support for those goals, and how well the office conveys its goals to the community. If communities are concerned about drug dealing in public housing and prosecutors work with communities to learn about and address crime in public housing, they can make targeted enforcement efforts, selectively seeking eviction only when it appears that a defendant poses a security risk to neighbors. If they lacked the ability to influence evictions, they might pursue heightened criminal sanctions across the board. The concern, however, is that prosecutors may seek collateral enforcement as a general matter, rather than investing the time to determine whether the community would be safer as a result of the eviction. The risk is that prosecutors will take the default approach of seeking collateral consequences as an additional means of achieving deterrence, even when there is no compelling rationale for doing so.

With respect to procedural fairness, commentary has tended to focus on whether defendants are aware of the collateral consequence at the time of the guilty plea. But procedural fairness depends on more than access to information about the collateral consequences. It also depends on defendants' ability to make reasoned judgments, access viable alternatives, and seek the advice of counsel. Defendants may not face a simple choice between going to trial or accepting a plea. Given the delays associated with obtaining a trial in misdemeanor courts—and the risk that the open arrest itself may lead to job loss or other significant penalties—even informed defendants have limited options. They evaluate the impact of process costs, the possibility of heightened criminal sanctions if they proceed to trial and lose, and the risk that a quick plea may carry a more serious collateral consequence. The choice is how best to manage the impact of a criminal record in a way that causes the least amount of harm.

Collateral consequences can also exacerbate existing information disparities between defendants and prosecutors. Even setting aside collateral consequences, prosecutors have important pre-plea information advantages over defendants in criminal cases.¹⁷⁴ When defense attorneys negotiate collateral

173. *Id.*

174. DAVIS, *supra* note 18, at 22–39 (discussing prosecutors' control over charges and grand juries).

consequences with prosecutors, they face additional information barriers. Prosecutors can bring to bear a wide range of priorities when they evaluate collateral consequences. It can be difficult for a defendant to ascertain these priorities and to know *ex ante* if the prosecutor considers loss of work an undesirable public policy outcome or an appropriate and fitting penalty. The relevant considerations extend far beyond the criminal law.

In some cases, collateral consequences create ethical dilemmas for defense counsel and defendants for which there is no easy answer. Consider an example raised by the Deputy State Public Defender of Wisconsin, Michael Tobin, who asks how to respond when a former client asks, “Why didn’t my lawyer tell me to plead guilty?”¹⁷⁵ Tobin notes that in Wisconsin some young defendants are better off with a conviction rather than a dismissal because the conviction will be expunged but a dismissal of the same charge will remain on the defendant’s record and likely serve as a barrier to employment.¹⁷⁶ If the defendant cares most about the “mark” of a criminal record, she would be well-advised to plead guilty, even if she can persuade the prosecutor to dismiss the case.

This scenario represents an extreme version of the ethical dilemma defense attorneys face whenever they advise defendants who could likely prevail at trial that they would be better off pleading guilty. The advice might be sound if the concern is minimizing the overall harm that flows from an arrest, but it also reflects a deeper procedural fairness problem. Defendants who care most about avoiding collateral consequences may accept criminal convictions because they trigger the fewest known harms,¹⁷⁷ not because they reflect culpability or the strength of the evidence.

Plea bargaining in light of collateral consequences enables prosecutors to blend civil and criminal penalties in a way that is instrumental rather than principled. Writing in the “cimmigration” context, David Sklansky uses the term “ad hoc instrumentalism” to describe “a manner of thinking about law and legal institutions that downplays concerns about consistency. . . . In any given situation, faced with any given problem, officials are encouraged to use whichever tools are most effective against the person or persons causing the problem.”¹⁷⁸ Sklansky describes this approach as “instrumental” because “whether

175. Michael Tobin, *Dismissed Charges Not Always the Best Outcome?*, COLLATERAL CONSEQUENCES RESOURCE CTR. (Nov. 13, 2014), <http://ccresourcecenter.org/2014/11/13/dismissed-charges-not-always-the-best-outcome/> [https://perma.cc/W3CS-4BB2].

176. *Id.* For purposes of this discussion, I assume that sealing is effective in preventing criminal records from being accessed by other parties. But as a practical matter, this is not always the case. Adam Liptak, *Expunged Criminal Records Live to Tell Tales*, N.Y. TIMES (Oct. 17, 2006), <http://www.nytimes.com/2006/10/17/us/17expunge.html?pagewanted=all> [http://perma.cc/EO7A-8944].

177. Even informed defendants who bargain around collateral consequences face significant uncertainty about the long-term consequences of their criminal record. This is particularly true in the employment context. See DEVAH PAGER, MARKED: RACE, CRIME, AND FINDING WORK IN AN ERA OF MASS INCARCERATION 34 (2007).

178. David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM. L. REV. 157, 161 (2012).

behavior should be treated as criminal, for example, depends on whether criminal procedures and sanctions will best accomplish the government's objectives, not on any abstract considerations of fit or appropriateness" and as "ad hoc" because "whether to invoke criminal procedures and criminal sanctions is decided case by case, based on whatever circumstances seem most compelling in that particular instance."¹⁷⁹

This approach creates the risk that prosecutors will selectively enforce collateral consequences when it serves their own broadly defined interests but ignore them when it does not. The plea bargaining process itself may facilitate this dynamic. Plea bargaining is a poor vehicle for making principled arguments. With plea bargains—as with contracts in general—the law regulates the final outcome, and to some extent the process by which parties reach that outcome, but not a party's rationale for seeking the deal. A party has every incentive to appeal to whatever she believes her adversary's interests to be rather than make an argument from principle. Pragmatic arguments—those that emphasize administrative capacity and efficiency—may be more persuasive than principled arguments about fairness and proportionality.¹⁸⁰

The risk is that, on a systemic level, prosecutors may privilege pragmatic concerns about case management over other interests. A prosecutor might choose to pursue sanctions that result in serious harms—deportation, pension loss, or loss of housing—because these penalties provide a source of leverage or because they are easily available rather than because they are justified and proportionate.

Selective enforcement of collateral consequences also runs the risk of exacerbating underlying biases in the criminal justice system. As a general matter, discretionary and nontransparent interactions are rife with potential for discrimination. Race discrimination has been documented in contexts such as buying a retail car,¹⁸¹ seeking to buy or rent a home,¹⁸² and applying for a job,¹⁸³ as well as in a range of discretionary decisions that are made in the criminal justice system.¹⁸⁴ Plea negotiations are no exception.¹⁸⁵

179. *Id.*

180. The Supreme Court's opinion in *Padilla* could arguably be said to reflect this approach as well. It cited an administrative efficiency rationale as the only reason for why a prosecutor might mitigate a collateral consequence—"the threat of deportation may provide the defendant with 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"—even though the opinion as a whole also expressed concerns about deportation functioning as a disproportionate penalty. *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010).

181. See Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 819 (1991).

182. MARGERY AUSTIN TURNER ET AL., U.S. DEP'T OF HOUS. & URBAN DEV., HOUSING DISCRIMINATION AGAINST RACIAL AND ETHNIC MINORITIES 2012 (2013), [http://www.huduser.org/portal/Publications/pdf/ HUD-514_HDS2012.pdf](http://www.huduser.org/portal/Publications/pdf/HUD-514_HDS2012.pdf) [<http://perma.cc/7U7J-7VRC>].

183. See, e.g., Devah Pager et al., *Discrimination in a Low-Wage Labor Market: A Field Experiment*, 74 AM. SOC. REV. 777, 777–79 (2009) (finding systemic discrimination in hiring because of race).

184. See, e.g., ALEXANDER, *supra* note 57; Davis, *supra* note 57, at 16 (stating that African-Americans are discriminated against throughout the criminal justice process as compared to whites);

One recent study found that federal prosecutors are nearly twice as likely to charge African-American men with crimes that triggered mandatory minimums than they are to charge whites with those crimes.¹⁸⁶ Data from state prosecutors' offices reflect a similar bias. In a rare move, the District Attorney of New York—one of the largest prosecutor's offices in the country—voluntarily opened two years' worth of files to outside scrutiny for racial discrimination.¹⁸⁷ After analyzing the files from 2012 to 2014, a study conducted by the Vera Institute for Justice found systemic racial discrimination in plea outcomes.¹⁸⁸ Black defendants in misdemeanor drug cases were almost thirty percent more likely than similarly situated whites to receive a custodial sentence (one that included jail or prison time) instead of a sentence that included noncustodial offers such as community service or probation.¹⁸⁹

Prosecutors, of course, are not alone in exhibiting bias. Defense attorneys likewise exhibit bias in triaging cases, offering counsel, and in the rigorosity of their advocacy.¹⁹⁰ The combined effects of biased decision making can be devastating for African-Americans, who are not only disproportionately likely to be arrested, but also disproportionately experience collateral consequences because of a criminal record.¹⁹¹

B. UNDERMINING LAW ENFORCEMENT LEGITIMACY

Collateral consequences impact communities, not just the parties to the plea. Community policing and prosecution strategies are premised on the idea that community participation and deliberation matter.¹⁹² In theory, police and prosecutors respond to the concerns of communities, which in turn evaluate and respond to how law enforcement officials pursue their goals. Transparency and

Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1272–73 (2004) (discussing mass incarceration of African-American men).

185. See Barkow, *supra* note 18, at 883 (“The consolidation of adjudicative and enforcement power in a single prosecutor is also troubling because it creates an opportunity for that actor’s prejudices and biases to dictate outcomes.”).

186. See Sonja B. Starr & M. Marit Rehani, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L.J. 2, 7 (2013).

187. BESIKI KUTATELADZE ET AL., VERA INST. OF JUSTICE, RACE AND PROSECUTION IN MANHATTAN 1–2 (2014), <http://www.vera.org/sites/default/files/resources/downloads/race-and-prosecution-manhattan-summary.pdf> [<https://perma.cc/PY5P-62WN>].

188. *Id.* at 3.

189. *Id.* at 7. These statistics are revealing for another reason: they are not a representative sample. A study based only on prosecutors who voluntarily open up their files for scrutiny is subject to selection bias; those who chose not to share their files may well display more bias.

190. See generally L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626 (2013) (discussing how implicit racial bias can adversely affect African-American defendants).

191. African-Americans, for instance, are disproportionately likely to be denied work because of a criminal record. Pager et al., *supra* note 183, at 777–80; Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 957–60 (2003).

192. David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1797 (2005) (noting that both critics and proponents of order-maintenance policing tactics emphasize the importance of “participation and deliberation”).

effective communication are essential to this approach; communities need to understand how law enforcement agencies define and implement their goals. Collateral consequences erect barriers to achieving transparency. They prevent communities from understanding the work that prosecutors are doing.

To be clear, even in the context of criminal law, prosecutorial decision making is opaque. Plea bargaining takes place in a black box: dispositions are publicly reported, but not the process of reaching those dispositions. Collateral consequences further obscure the impact of prosecutorial decision making. Statistics that track outcomes in the criminal justice system—sentence lengths, rates of conviction, and type of conviction—provide important data regarding how prosecutors exercise discretion and define their goals. But these statistics do not reflect how prosecutors influence collateral consequences. Communities thus lose an important window into law enforcement decision making. This, in turn, undermines the ability of communities to understand how law enforcement agencies implement their enforcement agendas and to decide whether that enforcement authority is justified.¹⁹³

Consider the example of misdemeanor marijuana arrests. In recent years, in response to local sentiment, some law enforcement agencies have re-evaluated their approach to prosecuting minor marijuana possession.¹⁹⁴ In New York, for instance, after the Brooklyn District Attorney announced a policy of no longer prosecuting marijuana misdemeanors, the New York City Police Department followed suit. In late 2014, New York City announced that police would issue tickets instead of conducting arrests for low-level possession.¹⁹⁵ New York City's annual report demonstrates the impact of this change. In 2009, minor marijuana possession was the top charge in New York City; prosecutors filed over 40,000 petty misdemeanor possession charges. In 2014, the year the new policy was announced, that number dropped by half.¹⁹⁶ Law enforcement officials who supported the reform cited its potential to improve outcomes, particularly for minority community members who had been subject to disproportionate arrests.¹⁹⁷ This type of outcome—a law enforcement agency changing

193. Tom R. Tyler & Jeffrey Fagan, *Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?*, 6 OHIO ST. J. CRIM. L. 231, 235 (2008) (discussing the benefits of building law enforcement legitimacy).

194. Joseph Goldstein, *Marijuana May Mean Ticket, Not Arrest, in New York City*, N.Y. TIMES (Nov. 9, 2014), <http://www.nytimes.com/2014/11/10/nyregion/in-shift-police-dept-to-stop-low-level-marijuana-arrests-officials-say.html> [<http://perma.cc/GW8W-966M>].

195. This approach reflects a change in enforcement practices, but not a change in the law itself; marijuana possession remains a crime. For a discussion of distinct approaches that can fall within the rubric of “decriminalization,” see Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055 (2015).

196. OFFICE OF THE CHIEF CLERK OF N.Y.C. CRIMINAL COURT, CRIMINAL COURT OF THE CITY OF NEW YORK: ANNUAL REPORT 2014, at 31 (2015), https://www.nycourts.gov/COURTS/nyc/criminal/cc_annl_rpt_2014.pdf [<https://perma.cc/22E8-TX8P>]. This is the most recent report currently available.

197. See Press Release, City of New York, Office of the Mayor, Reactions to Mayor de Blasio, Commissioner Bratton's Announcement of Policy Change to Reduce Marijuana Possession Arrests

its practices in response to the needs of local communities—is the type of dynamic that community policing seeks to promote.

With collateral consequences, communities who want to understand the reach of prosecutorial discretion cannot rely on signifiers such as conviction rates or sentence lengths. A collateral consequence could follow from a conviction because the prosecutor was unaware of it and had no intentional role in shaping it. In other cases, the prosecutor may have deliberately structured a plea to create a collateral outcome. And in still other cases, the prosecutor may have made a significant but unsuccessful effort to mitigate a collateral consequence. Unless prosecutors make affirmative efforts to articulate how they approach collateral consequences, communities have little ability to ascertain how prosecutorial discretion relates to collateral consequences. This, in turn, can undermine efforts by law enforcement to reach out to communities and build better relationships.

C. DISRUPTING CIVIL REGULATORS

State and local prosecutors balance many competing interests. Fidelity to the goals of civil regulators is generally not among them. To be sure, prosecutors may choose to align their efforts with civil regulatory agencies when they have overlapping interests or when they receive funding or other forms of support. But absent these considerations, prosecutors who make de facto decisions about collateral consequences do not apply the same criteria as civil regulatory actors. This dynamic can disrupt civil enforcement priorities. It also extends the impact of prosecutorial decision making to factors that lie outside prosecutors' institutional competence.

There are two different ways prosecutorial discretion can affect collateral consequences. The impact of prosecutorial discretion is most pronounced when collateral consequences are mandatory or largely automatic. With mandatory collateral consequences, lawmakers have chosen to strip discretion from civil regulators. After a conviction, the civil penalty necessarily follows. For instance, in 1996, federal lawmakers expanded the categories of conviction that triggered mandatory deportation for lawful permanent residents.¹⁹⁸ Previously, immigration enforcement officials had broader discretion not to engage in removal after the conviction.¹⁹⁹ In taking this approach, lawmakers may have intended to strip discretion altogether; they may have intended that every immigrant convicted of a particular crime be deported. But, because criminal charges are redundant and some charges carry immigration consequences whereas

(Nov. 10, 2014), <http://www1.nyc.gov/office-of-the-mayor/news/509-14/reactions-mayor-de-blasio-commissioner-bratton-s-announcement-policy-change-reduce> [<https://perma.cc/S84A-S2UP>].

198. See Morawetz, *supra* note 68, at 1936 (describing the 1996 Antiterrorism and Effective Death Penalty Act and the Illegal Immigration Reform and Immigrant Responsibility Act as having “drastically changed the consequences of criminal convictions for lawful permanent residents” by making deportation mandatory, rather than discretionary, in “large classes of cases”).

199. *Id.* at 1938–39.

others do not, criminal prosecutors continued to exercise discretion over immigration removal decisions. Immigration officials, however, did not. Thus, in practice, mandatory collateral consequences strip administrative discretion from civil regulators, but not from criminal prosecutors.

By contrast, with discretionary consequences, civil regulatory actors retain the ability to exercise discretion after a conviction. Prosecutors exercise discretion through the charging and plea bargaining process. Civil regulators then exercise formal discretion by determining whether to proceed with a civil penalty.

Prosecutors who enforce collateral consequences bring to bear incentives that are distinct from civil regulators. Writing in the immigration context, Stephen Lee highlights this dynamic and conceptualizes state prosecutors as “de facto immigration courts.”²⁰⁰ State prosecutors are not formally tasked with immigration enforcement authority, but they possess the functional authority to make decisions about removal.²⁰¹ However, there is a key difference in how they exercise discretion vis-à-vis immigration officials. When federal immigration officials exercise discretion, they are subject to publicly available guidance.²⁰² These guidelines reflect the agency’s priorities. Criminal prosecutors, on the other hand, have no obligation to defer to those priorities. Instead, prosecutors respond to structural incentives, such as the law enforcement needs of the community, resource constraints, and relationships with the defense bar. As a functional matter, the prosecutor can thus exercise more power than the government officials who have been formally tasked with enforcement power and who have the institutional competence to make civil regulatory judgments.

This dynamic is perhaps most problematic when the prosecutor is the only actor who exercises discretion, as with automatic collateral consequences. But in practice, even with discretionary collateral consequences, prosecutors exercise significant influence. Public housing authorities, for instance, often have discretion over whether to evict households after one member’s conviction, including on the basis of factors such as the seriousness of the offense or its impact on other members of a household.²⁰³ But they may not actually exercise that discretion if they can easily replace one tenant with another from a long waitlist.

In addition, even when civil regulators ultimately choose not to trigger a collateral consequence, prosecutors can trigger an immediate enforcement decision while the civil regulatory proceeding is pending. A noncitizen may spend months in civil immigration detention after a minor criminal conviction, even if immigration authorities ultimately make a discretionary judgment not to pro-

200. Lee, *supra* note 69, at 553.

201. *Id.* at 556.

202. *Id.* at 577–78.

203. See, e.g., Letter from Michael M. Liu, Assistant Sec’y, U.S. Dep’t of Hous. & Urban Dev., to Pub. Hous. Dirs. (June 6, 2002), <http://www.hud.gov/offices/pih/regs/rucker6jun2002.pdf> [<http://perma.cc/4WWZ-QD6T>] (issuing guidance on factors that ought to guide eviction decisions).

ceed with deportation.²⁰⁴ With professional licensing, there may be a delay between the conviction and the civil regulatory decision, during which time the defendant is subject to an unpaid suspension.²⁰⁵ Thus, civil administrative discretion at best limits the impact of prosecutorial discretion, but it does not offset it altogether.

Prosecutorial decision making can also be more opaque than that of civil regulators. Prosecutors exercise autonomy, discretion, and a unique degree of “unreviewable power.”²⁰⁶ This is particularly true in petty cases.²⁰⁷ Plea agreements need not even be written down.²⁰⁸ Law enforcement agencies publish disposition information about the ultimate criminal conviction and sentence. But disposition information alone does not show whether, how, or why prosecutors influence collateral consequences. By contrast, some civil regulatory agencies publish considerable data about their administrative priorities and enforcement decisions.²⁰⁹

Relative to policymakers, judges, or other actors, prosecutors might be best situated to evaluate whether and when enforcement of collateral consequences reduces crime. They might also have the most institutional competence to evaluate how collateral consequences affect their administrative capacities. But they have no particular institutional competence to decide public policy at large. When prosecutors influence collateral consequences based on their workloads or their views on public policy, their motivations can play an outsized and undesirable role in fashioning policy.

Even when prosecutors seek to influence collateral consequences primarily from the perspective of reducing crime, their enforcement choices run the risk of undermining other competing interests. As Rachel Barkow put it in a related context, when decisions about evictions or deportation are made by prosecutors—“and thus through the lens of what would be good for prosecutors and their cases and from the limited perspective of those who have prosecuted cases but have not represented other interests”—there is the risk that the outcome is not

204. See, e.g., *supra* note 2 and accompanying text.

205. This dynamic can be true of arrests as well. See Jain, *supra* note 44, at 865 (discussing taxicab license suspension).

206. Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 960 (2009); See Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CALIF. L. REV. 323, 331 (2004) (“[P]rosecutors have essentially no formal external checks on their discretion.”); Stuntz, *supra* note 19, at 522.

207. See Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1317 (2012) (“More broadly, misdemeanor processing reveals the deep structure of the criminal system: as a pyramid that functions relatively transparently and according to legal principle at the top, but in an opaque and unprincipled way for the vast majority of cases at the bottom.”).

208. See Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1154 (2011).

209. Immigration enforcement authorities, for instance, publish data about their enforcement priorities and the number and type of removals in any given year. See, e.g., U.S. IMMIGRATION & CUSTOMS ENFT, ERO ANNUAL REPORT: FY 2013 ICE IMMIGRATION REMOVALS 2 (2013), <http://www.ice.gov/doclib/about/offices/ero/pdf/2013-ice-immigration-removals.pdf> [<http://perma.cc/FQ4G-KEAP>].

“good policy overall, taking into account interests other than law enforcement.”²¹⁰

Collateral consequences can also obscure how civil and criminal regulatory bureaucracies influence each other. Prosecutors and civil regulators each may depict themselves as operating independently when, in fact, they work together to shape a shared agenda. Immigration enforcement officials who focus on “criminal aliens,” for instance, state that removal decisions turn on the severity of conviction.²¹¹ This conveys a separate decision-making process; the criminal justice system operates first, determines the type of conviction, and the immigration decision takes place afterward.²¹² But, on a practical level, civil regulatory officials may coordinate with prosecutors to shape how convictions unfold in the first instance. Immigration & Customs Enforcement (ICE) not only establishes removal priorities based on the type and severity of criminal convictions, but it also to some extent shapes what types of convictions fall within those priorities. ICE offers training to state prosecutors designed to influence their decision making. In one training, for instance, ICE described “10 Ways that Criminal Aliens Avoid Immigration Consequences for Their Convictions.”²¹³ This training goes beyond the provision of factual information about how immigration enforcement unfolds; it implicitly acknowledges that convictions are an imperfect proxy for ICE’s goals. Sometimes the proxy is too broad, and, at other times, it is not broad enough to capture those that ICE seeks to deport.

Immigration enforcement officials are thus aware that state prosecutors who adjust plea bargains have the ability to frustrate their goals, and they can respond by reaching out to state prosecutors and advocating for convictions that are more in keeping with ICE’s own regulatory priorities. This may be a reasonable administrative response. It is nonetheless at odds with immigration officials’ public position that they apply their discretion to convictions as opposed to actively shaping how those convictions take place. This type of interaction also undermines the public’s interest in understanding the true reach of prosecutorial discretion. The public is aware of ICE’s stated agenda and its own enforcement decisions, but not how ICE shapes the behavior of formally independent state prosecutors.

CONCLUSION

Advocates and policymakers have recently made welcome efforts to lower the barriers to understanding collateral consequences. But in itself, informed

210. Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271, 274 (2013).

211. See U.S. IMMIGRATION & CUSTOMS ENF’T, ICE ENFORCEMENT AND REMOVAL OPERATIONS REPORT: FISCAL YEAR 2015 1 (2015), <https://www.ice.gov/sites/default/files/documents/Report/2016/fy2015removalStats.pdf> [<https://perma.cc/L722-9NCA>] (discussing federal immigration removal priorities and showing how many removals fell within those priorities).

212. See Eagly, *supra* note 136 (describing and criticizing the view that immigration enforcement and criminal prosecution proceed on separate tracks).

213. Eagly, *supra* note 107, at 1221–22.

consideration of collateral consequences will not necessarily lead to better outcomes. On a functional level, informed consideration of collateral consequences shifts enforcement discretion to the prosecutors who play a crucial role in plea outcomes. Much depends on how prosecutors exercise their discretion.

To robustly engage with the question of what ought to be done, there is a need for more empirical information about how prosecutors respond to collateral consequences during the plea bargaining process. As policymakers develop resources designed to facilitate informed consideration of collateral consequences, it is important to understand how both prosecutors and defense attorneys make use of these resources going forward.

I conclude by outlining possible directions for future work. My goal is to illuminate relevant questions, suggest directions for reforms, and illustrate the potential tradeoffs of certain approaches. I consider potential avenues for reform along the following general dimensions: promoting informed plea bargaining, transferring some enforcement discretion to actors other than prosecutors, and guiding the exercise of prosecutorial discretion.

First, prosecutors as well as defendants and defense attorneys need to be aware of collateral consequences during the plea bargaining process. Prosecutors who are unaware of collateral consequences can unintentionally trigger civil consequences. This can impose more harm than they believe is justified, and it can work against the state's broader interests in reducing crime and building community relationships.

In *Padilla*, the U.S. Supreme Court took an important first step in recognizing how awareness of immigration consequences could change the behavior of both prosecutors and defendants. There are compelling reasons to apply the *Padilla* rationale outside the immigration context. Recently, the Pennsylvania Supreme Court declined to extend *Padilla* to the case of pension loss, reasoning that loss of money was not equivalent to deportation.²¹⁴ But as some Justices recognized during the *Padilla* oral argument, it is hard to draw a principled distinction between deportation and other collateral consequences, such as lifelong civil confinement.²¹⁵ Depending on their circumstances, reasonable people might differ about which penalty they find the most severe.

A different, more normatively defensible rule would require defense counsel to inform defendants of any collateral consequence that might well have a significant impact on a reasonable defendant.²¹⁶ This is an objective test; it does

214. *See supra* notes 80–81 and accompanying text.

215. *See* Transcript of Oral Argument at 53, *Padilla v. Kentucky*, 559 U.S. 356 (2010) (No. 08-651) (“Which, if any of the following, would you not put in the same category as advice about immigration consequences: Advice about consequences for a conviction for a sex offense, the loss of professional licensing or future employment opportunities, civil liability, tax liability, right to vote, right to bear arms.”).

216. Jenny Roberts has advocated for this reform in detail. *See* Roberts, *supra* note 71, at 674, 713–35 (advocating for a duty of defense counsel to warn “whenever 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”).

not turn on the type of offense or the defendant's particular reactions to it.

In assessing the merits of this approach, one set of questions relates to constraints on providing information about collateral consequences. Current levels of indigent defense funding are nowhere near sufficient to provide for meaningful advice. Public defenders face chronic funding deficits, in the most egregious cases representing upward of 2,000 clients per year.²¹⁷ A serious commitment to providing advice about collateral consequences would require either a dramatic reduction in the number of collateral consequences or in the reach of the criminal justice system. Even then, defense attorneys will remain ill-equipped to address a range of privately imposed collateral consequences, such as barriers to employment.

One possibility is that a genuine commitment to promoting information about collateral consequences might indeed “break the back” of the plea bargaining system.²¹⁸ This would lead to smaller criminal caseloads overall. But another possibility is that collateral consequences might be replaced by other penal techniques that are even less visible and harder to address. Recent scholarship analyzes this trend in a number of different settings. Alexandra Natapoff makes the argument, for instance, that the decriminalization of certain misdemeanors (as opposed to full legalization) carries a “dark side” through the generation of noncriminal offenses that are easy to impose and that are still punishable by fines, arrests, and jail time.²¹⁹ Similar dynamics emerge with the widespread use of penal techniques such as supervised release or alternative courts. These measures are often depicted as better alternatives to traditional penal techniques such as incarceration, but they also allow for indeterminate and significant forms of punishment with diminished procedural protections.²²⁰

Another important issue is which type of institution ought to exercise discretion over collateral consequences. Mandatory or largely automatic collateral consequences—those that do not permit civil enforcement actors to exercise enforcement discretion following a conviction—grant prosecutors the most

217. NAT'L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 72 (2009), <http://www.constitutionproject.org/wp-content/uploads/2012/10/139.pdf> [<http://perma.cc/TSQ3-BZ63>]; NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 9 (2009), [http://www.nacdl.org/public.nsf/defenseupdates/misdemeanor/\\$FILE/Report.pdf](http://www.nacdl.org/public.nsf/defenseupdates/misdemeanor/$FILE/Report.pdf) [<http://perma.cc/D66S-NMQP>]; Natapoff, *supra* note 153, at 1070 (“Most misdemeanor counsel as a practical matter cannot provide a zealous defense, or sometimes any defense at all, due to underfunding and massive caseloads.”); Roberts, *supra* note 27, at 279–80 (discussing indigent defenders who are paid by flat fee and carry caseloads of over 2,000 clients a year, well above the national recommendations).

218. Brief for States, *supra* note 86, at 1.

219. See Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1055, 1058–60 (2015).

220. See Fiona Doherty, *Indeterminate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. REV. 958 (2013); Tonja Jacobi et al., *The Attrition of Rights Under Parole*, 87 S. CAL. L. REV. 887, 889, 891–92 (2014) (arguing that although parole is widely considered a “defendant-friendly” institution it undermines important Fourth Amendment rights of both defendants and their communities); Allegra M. McLeod, *Decarceration Courts: Possibilities and Perils of a Shifting Criminal Law*, 100 GEO. L.J. 1587 (2012).

functional control over collateral consequences. Discretionary collateral consequences give prosecutors less formal influence; both the prosecutor and the civil regulator must make a decision to trigger the collateral consequence.

As a structural matter, mandatory collateral consequences give prosecutors the most enforcement power. For a number of reasons, this approach is undesirable. Prosecutors are not well-suited to making broad judgments about policy. They decide issues that lie far outside their institutional competence. Prosecutors exercise a unique degree of autonomy and they have a number of competing incentives. Attempting to balance these interests can lead prosecutors to take approaches that may undermine broader public policy objectives as well as their own law enforcement goals.

As a formal matter, discretionary collateral consequences may thus appear to be a better approach. With discretionary collateral consequences, both civil and criminal actors have the ability to exercise discretion. In theory, this limits the impact of prosecutorial discretion. But discretionary collateral consequences can create their own problems. They can undermine efforts to promote information about collateral consequences. Mandatory collateral consequences provide a level of certainty that discretionary ones do not. Discretionary consequences are much harder for defense attorneys to predict. This creates the risk that collateral consequences will still be imposed as frequently as they are under a mandatory framework, but defendants will have even less information when considering them during the plea bargaining process. Thus, in evaluating the merits of mandatory or discretionary collateral consequences, a crucial factor is whether and when civil regulators actually exercise discretion.²²¹

Another consideration is whether there is a viable way to retain certain collateral consequences but also channel enforcement discretion away from prosecutors. Some localities have taken the approach of having an agency, similar to a parole board, evaluate whether postconviction collateral consequences are justified. For certain types of collateral consequences, this approach provides a back-end way of disaggregating civil and criminal penalties. A handful of states adopt this approach through administrative “certificates of rehabilitation.”²²² New York has the most expansive program and allows former defendants to apply for relief from employment and other collateral conse-

221. Hiroshi Motomura, for instance, has argued that immigration enforcement officials too often fail to exercise meaningful discretion after an arrest in the context of identifying and removing unauthorized immigrants. Motomura argues that the “discretion that matters” in the immigration context is thus the discretion to arrest, not backend civil administrative discretion. HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 129–30 (2014); Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil–Criminal Line*, 58 UCLA L. REV. 1819, 1858 (2011).

222. AM. BAR ASS’N COMM’N ON EFFECTIVE CRIMINAL SANCTIONS, SECOND CHANCES IN THE CRIMINAL JUSTICE SYSTEM: ALTERNATIVES TO INCARCERATION AND REENTRY STRATEGIES 50 (2007), <http://www.americanbar.org/content/dam/aba/migrated/cecs/secondchances.authcheckdam.pdf> [https://perma.cc/2EDB-LGWS].

quences.²²³ The certificate automatically removes statutory barriers to employment and provides presumptive “proof of rehabilitation.”²²⁴ This approach still allows prosecutors to make a front-end decision about collateral enforcement because the collateral penalty is linked to the conviction. But the certificate of rehabilitation—at least for those who are able to go through the additional process of seeking it—provides a downstream way to remove the collateral consequence. It provides an avenue for another actor to review the collateral consequence and determine whether it is appropriate.

Another approach is for legislatures to create judicial oversight of collateral consequences. Judges could evaluate collateral consequences during sentencing and exercise discretion to modify the sentence if the court determines that the collateral sanction is excessive and does not serve the interests of justice. Legislatures could also allow for “judicial recommendations” against the imposition of a particular collateral consequence. As the *Padilla* Court recognized, immigration law previously allowed for a “judicial recommendation against deportation,” or a JRAD, whereby judges made binding recommendations against removal.²²⁵ The JRAD represented a “formal” way for judges to operate “within the interstitial space binding the immigration and the criminal justice systems.”²²⁶ One version of the JRAD also allowed the judge to seek input from the prosecutor, the defendant, and immigration enforcement officials about whether a particular immigration outcome is desirable.²²⁷ This approach limits the impact of prosecutorial discretion, but it creates the risk of a greater administrative burden.

Other reforms could guide the exercise of prosecutorial discretion. One way of doing this is through publicly available prosecutorial discretion guidelines. Former U.S. Attorney General Eric Holder took this approach by establishing guidelines for federal sentencing and charging.²²⁸ The guidelines established what criteria are not permissible in plea bargaining. For instance, the guidelines stated that “[p]lea agreements should reflect the totality of a defendant’s conduct” and prohibited charges from being filed “simply to exert leverage to

223. *Id.*; see also N.Y. CORRECT. LAW §§ 700–705, 703-a, 703-b (McKinney 2015).

224. N.Y. CORRECT. LAW §§ 700–705, 703-a, 703-b (McKinney 2015).

225. *Padilla v. Kentucky*, 559 U.S. 356, 361–62 (2010). The Court further noted that the “JRAD[] had the effect of binding the Executive to prevent deportation; the statute was ‘consistently . . . interpreted as giving the sentencing judge conclusive authority to decide whether a particular conviction should be disregarded as a basis for deportation.’” *Id.* at 362 (quoting *Janvier v. United States*, 793 F.2d 449, 452 (2d Cir. 1986)). For discussions of the benefits of reintroducing the JRAD, see Jason A. Cade, Essay, *Return of the JRAD*, 90 N.Y.U. L. REV. ONLINE 36 (2015); Lee, *supra* note 69, at 597–600.

226. Lee, *supra* note 69, at 598.

227. See *id.*

228. See Memorandum from Eric H. Holder, Jr., U.S. Attorney Gen., to All Federal Prosecutors 1 (May, 19, 2010), <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/holder-memo-charging-sentencing.pdf> [<http://perma.cc/F3EL-HF85>] (including instructions that “[c]harging decisions . . . be informed . . . by the general purposes of criminal law enforcement: punishment, public safety, deterrence, and rehabilitation”).

induce a plea.”²²⁹ In addition, the guidelines established an internal review procedure for plea bargains; they required that plea agreements be reviewed by a supervising attorney and evaluated against office-level written guidance governing the standard elements of plea agreements.²³⁰

Federal immigration enforcement guidance provides another model. In a series of memoranda, ICE authorities established departmental guidance about what criteria should be used in immigration prosecutions, including a set of prosecutorial priorities and guidelines for ICE agents to use in exercising discretion.²³¹ ICE also publishes data regarding its removals that allow the public to assess how well it adheres to these stated priorities. ICE has long exercised de facto discretion in choosing which noncitizen defendants to remove, but the memoranda standardize and make explicit the principles that ought to guide the exercise of prosecutorial discretion.

Ethical rules that address collateral consequences could also guide the exercise of prosecutorial discretion. Prosecutorial ethics as a whole does not contemplate prosecutorial power that arises as a result of the prosecutor’s control over collateral consequences, as opposed to the criminal justice process itself.²³² Thus, some prosecutors might regard a deviation from a standard plea to accommodate a collateral penalty as favoritism, whereas others view mitigation as necessary to avoid disproportionately burdening some defendants.²³³ Ethical guidance could acknowledge that prosecutors have the functional ability to enforce collateral consequences, and it could establish guidelines for when it is or is not appropriate to do so. One dividing line could be based on what considerations are appropriate to take into account. Arguably, the most problematic instances of enforcement occur when prosecutors act pursuant to public policy rationales as opposed to reasonable law-enforcement rationales, when they seek collateral enforcement for retributive purposes, and when they leverage the threat of collateral consequences just to obtain a plea. Ethical guidance could establish that these considerations should not be taken into account.

Lawmakers and courts have begun to recognize that, all too often, no actor gives adequate consideration to the impact of collateral consequences during the

229. *See id.* at 2.

230. *See id.*

231. Memorandum from Jeh Charles Johnson, U.S. Sec’y of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enf’t, et al. (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf [<http://perma.cc/4ZS5-FJ3K>]; Memorandum from John Morton, Dir., U.S. Immigration & Customs Enf’t, to All ICE Employees (Mar. 2, 2011), http://www.ice.gov/doclib/foia/prosecutorial-discretion/civil-imm-enforcement-priorities_app-detrn-reml-aliens.pdf [<http://perma.cc/24L6-74RU>].

232. *See, e.g.*, Model Rules of Prof’l Conduct r. 3.8 (Am. Bar Ass’n 2015).

233. *See, e.g.*, Gabriel J. Chin, *Illegal Entry as Crime, Deportation as Punishment: Immigration Status and the Criminal Process*, 58 UCLA L. REV. 1417 (2011) (discussing how immigration status can be used in criminal proceedings so as to systemically advantage and disadvantage noncitizens as compared to U.S. citizens); Eagly, *supra* note 107, at 1165 (noting that some readers may view the “alienage-neutral” approach to immigration as providing a “benefit” to noncitizens, while others could view a failure to account for collateral consequences as discriminatory).

criminal justice process. This has led to much-needed reforms designed to promote awareness of collateral consequences. But, as courts and commentators promote informed plea bargaining, it is important to recognize the range of interests that prosecutors can bring to bear. Prosecutors can bring widely divergent motivations, public policy preferences, and law-enforcement priorities to the plea bargaining process. Prosecutors can mitigate disproportionate collateral outcomes, seek to ensure that those outcomes will follow, or simply strengthen their own bargaining position. As a result, the already-long arm of prosecutorial discretion extends well beyond the criminal law and reaches a range of important public policy decisions.