Boston College Law Review

Volume 62 | Issue 6 Article 7

6-29-2021

The Impact of Marijuana Decriminalization on Legal Permanent Residents: Why Descheduling Marijuana at the Federal Level Should Be a High Priority

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THE IMPACT OF MARIJUANA DECRIMINALIZATION ON LEGAL PERMANENT RESIDENTS: WHY LEGALIZING MARIJUANA AT THE FEDERAL LEVEL SHOULD BE A HIGH PRIORITY

Abstract: Although the federal government has remained firmly committed to prohibiting marijuana, many states have legalized the drug for either medical or recreational use. Others have merely decriminalized it, lowering the penalties associated with its use such that defendants charged with marijuana-related offenses are less likely to face incarceration. Most Americans stand to benefit from this change, as it means they face fewer meaningful consequences within the criminal justice system. By contrast, noncitizen offenders, including legal permanent residents (LPRs), may actually be disadvantaged by it. For example, LPRs living in jurisdictions that have decriminalized marijuana may mistakenly believe that it is safe to admit to marijuana use when communicating with immigration agents or law enforcement personnel. Due to the broad language of the Immigration and Nationality Act, however, such an admission can result in significant, adverse immigration consequences. Additionally, decriminalization makes it is less likely that indigent LPRs will receive court-appointed counsel to advise them of the immigration consequences of pleading guilty to seemingly minor marijuana-related charges. Although legalizing marijuana at the federal level would certainly address this issue, the federal government has repeatedly failed to enact such legislation. As such, states have stepped in, implementing various programs to protect their indigent, noncitizen residents. Although each has taken significant steps in the right direction, few have tackled the issue head-on.

INTRODUCTION

In April 2018, the United States deported Sothy Kum, a legal permanent resident (LPR) who immigrated from Cambodia when he was only two years old.[1] The grounds for his deportation was a February 2014 conviction for pos-

[1] Ting-Chia Kan, *Wisconsin Man—Who Arrived in U.S. in '81 as Cambodian Refugee—Is Deported for Marijuana Offenses, Leaving Behind His Wife and New Baby*, CHI. TRIB. (Aug. 08, 2019), https://www.chicagotribune.com/nation-world/ct-nw-wisconsin-immigrant-deported-marijuana-conviction-20190807-znilzvcm75clvmpy5c3teqr6sa-story.html [https://perma.cc/MQ7Q-BZHF]. Sothy, accompanied by his family, fled Cambodia and, as a result, spent years residing at refugee camps in both Thailand and the Philippines. Marnette Federis, *Deported to Cambodia*, THE WK. (June 1, 2018), https://theweek.com/articles/774834/deported-cambodia [https://perma.cc/E7PP-HB34]. Although Sothy left Cambodia when he was two years old, he did not arrive in the United States until he was approximately six. *Id.*

session of marijuana with intent to deliver for which he was sentenced to three years of probation, plus community service.[2] Almost two years later, in December 2015, law enforcement personnel found marijuana at Sothy's place of work.[3] Although Sothy vehemently maintained that the marijuana did not belong to him, the court considered it a violation of his probation and, as a result, ordered him to spend a year in prison.[4] Immediately after his release, Immigration and Customs Enforcement (ICE) took Sothy to a nearby immigration detention center.[5] He remained there for over seven months before he was deported, leaving his wife and young daughter behind.[6]

Sothy's story is not unusual.[7] Between 2003 and August 2018, it is estimated that the U.S. government deported more than 45,000 individuals across the country for mere possession of marijuana.[8] And, although Sothy was convicted in Wisconsin, where marijuana is illegal for all purposes, his story is not unique to individuals living in states with such stringent prohibitions.[9] In fact, even in states that have decriminalized marijuana, noncitizens face severe im-

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[2] Kan, *supra* note 1. A postal inspector determined that a package sent to the Kum family's home contained marijuana. *Id.* Sothy admitted that he had agreed to send several packages of marijuana to make additional income for his small business. *Id.*

[3] *Id.*

[4] *Id.* Sothy claimed that another person had left the marijuana at the office. *Id.* Only two weeks into Sothy's prison sentence, his wife discovered that she was pregnant. *Id.* In August 2016, she gave birth to their daughter while Sothy was still in prison. *Id.*

[5] *Id.* ICE, a division of the Department of Homeland Security (DHS), declares that it is committed to "protect[ing] America from the cross-border crime and illegal immigration that threaten national security and public safety." *Immigration and Customs Enforcement*, DEP'T OF HOMELAND SEC., https://www.dhs.gov/topic/immigration-and-customs-enforcement [https://perma.cc/NQ6U-Z44S].

[6] Kan, *supra* note 1. Sothy, who moved to Phnom Penh, Cambodia after his deportation, knew nobody when he first arrived. *Id.* The majority of his family, including his father, siblings, and adult son, still resided in the United States. *Id.*

[7] *See* Federis, *supra* note 1 (noting that, in early April 2018, the United States deported forty-three immigrants to Cambodia). When Sothy was deported, he was part of the largest group of Cambodians to be deported at once since the country began welcoming deportees from the United States. *Id.* Indeed, before the early 2000s, the Cambodian government had been reluctant to accept deportees from the United States because many had left Cambodia when they were very young or, in some cases, were born in other countries. *Id.* Moreover, Cambodia found that many deportees did not have the documentation necessary to demonstrate their Cambodian citizenship. *Id.* Notably, the number of individuals the United States has deported to Cambodia has drastically increased over time. *Id.* Between 2003 and 2016, the United States deported approximately 750 Cambodians. *Id.* Not only is the United States deporting an increasing number of immigrants to Cambodia, but the process has been expedited as well. *Id.* Whereas Sothy's case took almost two years to complete, the process now takes just a couple of weeks. *Id.*

[8] Kan, *supra* note 1. In 2013, the "fourth most common cause of deportation for any offense" was "simple cannabis possession." H.R. 3884, 116th Cong. § 2(9) (2d Sess. 2020).

[9] *See* WIS. STAT. ANN. § 961.41(3g) (West 2020) (providing that a first offense of marijuana possession is punished by up to six months in prison, a fine of up to one thousand dollars, or both); Kan, *supra* note 1 (noting that, although Governor Tony Evers has expressed interest in decriminalizing possession of small amounts of marijuana, doing so would do little to protect noncitizens because the drug remains illegal federally).

migration consequences for marijuana-related offenses because federal law, which criminalizes the possession of marijuana, controls.[10] This applies to LPRs who, despite having many of the same rights and responsibilities as U.S. citizens, experience equally harsh outcomes.[11]

In some ways, in fact, LPRs residing in the increasingly large number of states that have either legalized or decriminalized marijuana may be at an even greater disadvantage than those residing elsewhere in the country.[12] For one, noncitizens convicted of marijuana-related offenses in states that have decriminalized the drug will no longer serve prison time and, as a result, will be less likely to receive court-appointed counsel because, according to Supreme Court precedent, the Sixth Amendment only guarantees counsel where incarceration is imposed.[13] Although the impossibility of incarceration is something to be celebrated for the average, citizen offender, it could be disastrous for noncitizens who do not receive critical advice regarding the immigration consequences of pleading guilty to seemingly minor offenses.[14] Additionally, the relaxation of marijuana laws can lead noncitizens to believe that they can safely admit to using or possessing marijuana when communicating with government agents or other law enforcement personnel.[15] This belief is misguided, however, because a mere admission to marijuana-related conduct can lead to significant immigration consequences.[16]

This Note explores the negative effects of marijuana decriminalization on LPRs.[17] Part I of this Note describes how federal and state governments' stances on marijuana have developed over time and explores how criminal convictions can, as a general matter, have adverse immigration consequences for LPR

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[10] KATHY BRADY, ZACHARY NIGHTINGALE & MATT ADAMS, IMMIGRANT LEGAL RES. CTR., PRACTICE ADVISORY: IMMIGRATION RISKS OF LEGALIZED MARIJUANA 1 (2018).

[11] *Id.*

[12] *See infra* notes 13–16 and accompanying text.

[13] *See* Scott v. Illinois, 440 U.S. 367, 373–74 (1979) (holding that the Sixth Amendment, in conjunction with the Fourteenth Amendment, requires that no indigent criminal defendant be sentenced to prison unless the state provided him or her with court-appointed counsel).

[14] *See id.* (holding that indigent criminal defendants who are not sentenced to prison are not entitled to court-appointed counsel under the Sixth Amendment).

[15] BRADY, NIGHTINGALE & ADAMS, *supra* note 10, at 1. Accounts from noncitizens indicate that, in some parts of the country, agents from ICE, United States Citizenship and Immigration Services (USCIS), and Customs and Border Protection (CBP) are asking noncitizens whether they have ever possessed marijuana in hopes of finding them inadmissible. *Id.* at 1–2.

[16] *See, e.g.*, 8 U.S.C. § 1182(a)(2)(A)(i) ("[A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of . . . a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . is inadmissible.").

[17] *See infra* notes 18–203 and accompanying text. Although this issue is not unique to LPRs, the effects of marijuana decriminalization on other categories of noncitizens are beyond the scope of this Note.

offenders.[18] Additionally, it illustrates the circumstances in which the Sixth Amendment of the Constitution entitles a criminal defendant to a public defender.[19] Part II of this Note describes the specifically adverse immigration consequences LPRs can face for marijuana-related offenses.[20] Moreover, it explains how decriminalization may actually disadvantage LPRs.[21] Finally, Part III of this Note explains that the federal government has historically been reluctant to legalize marijuana at the federal level, leaving states to mitigate the effects themselves.[22] Additionally, it analyzes the Marijuana Opportunity Reinvestment and Expungement Act, a recent attempt at ending the federal ban on marijuana.[23]

I. Federal and State Governments' Stances on Marijuana and the Immigration Consequences of Criminal Convictions for LPRs

Marijuana is one issue over which state and federal laws conflict.[24] Section A of this Part demonstrates that although many states have legalized marijuana, the federal government continues to classify it as a controlled substance.[25] Section A also explains how the federal government has advised federal prosecutors operating in states where the drug is legal to proceed given the conflicting laws.[26] Section B provides background information about the U.S. immigration system and LPR status specifically.[27] Additionally, it explains that certain criminal offenses can make LPRs deportable, inadmissible, unable to obtain U.S. citizenship, or ineligible for certain forms of discretionary relief.[28]

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[18] *See infra* notes 30–106 and accompanying text.

[19] *See infra* notes 107–136 and accompanying text.

[20] *See infra* notes 140–159 and accompanying text.

[21] *See infra* notes 137–171 and accompanying text.

[22] *See infra* notes 172–193 and accompanying text.

[23] *See infra* notes 194–203 and accompanying text.

[24] *Compare* 21 U.S.C. § 812(c) (listing marijuana as a Schedule I drug), *with, e.g.*, Cal. Health & Safety Code §§ 11362.1, 11357 (2021) (removing penalties altogether for adults twenty-years or older who possess 28.5 grams or less of marijuana). Certain chemicals in the plant Cannabis sativa L., called cannabinoids, can have a psychoactive effect. Joanna R. Lampe, Cong. Rsch. Serv., LSB10482, State Marijuana "Legalization" and Federal Drug Law: A Brief Overview for Congress 1 (2020). For example, cannabis that contains substantial amounts of the chemical cannabinoid delta-9 tetrahydrocannabinol may be used as a recreational drug. *Id.* The non-psychoactive cannabinoid cannabidiol, by contrast, may be used for medicinal purposes. *Id.* Cannabis can be classified as either marijuana or hemp under federal law. *Id.* at 2. Other than a few exceptions, however, the Controlled Substances Act (CSA) generally categorizes the plant and its derivatives as "marihuana." *Id.*

[25] *See infra* notes 30–73 and accompanying text.

[26] *See infra* notes 30–73 and accompanying text.

[27] *See infra* notes 74–106 and accompanying text.

[28] *See infra* notes 74–106 and accompanying text.

Finally, Section C describes the circumstances in which the Sixth Amendment guarantees an indigent criminal defendant effective assistance of counsel.[29]

A. The Trend Toward Legalizing Marijuana

Although the federal government considers marijuana an illegal substance, many states have abandoned this position.[30] Subsection 1 describes how the federal prohibition on marijuana came about, focusing primarily on the "war on drugs" of the late twentieth century.[31] Subsection 2 explains how states have gradually moved away from the federal prohibition on marijuana toward legalization of the drug.[32] Subsection 3 illustrates how the federal government has responded to these changes.[33] Specifically, it describes the guidance the federal government has given to federal prosecutors operating in states where the drug is legal.[34]

1. Federal and State Prohibitions on Marijuana

By the late 1930s, all fifty states had limited the use of marijuana, and thirty-five states had gone so far as to criminalize it.[35] Similarly, in 1937, Congress passed the Marijuana Tax Act, the first federal ban on marijuana.[36] Its enactment is generally credited to Harry J. Anslinger, the first Commissioner of the Federal Bureau of Narcotics.[37] Anslinger, who was troubled by the

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[29] *See infra* notes 107–136 and accompanying text.

[30] *See* Steve P. Calandrillo & Katelyn Fulton, *"High" Standards: The Wave of Marijuana Legalization Sweeping America Ignores the Hidden Risks of Edibles*, 80 OHIO ST. L.J. 201, 210 (2019) (listing the states that have legalized marijuana for both medical and recreational use as of the date of publication).

[31] *See infra* notes 35–49 and accompanying text.

[32] *See infra* notes 50–60 and accompanying text.

[33] *See infra* notes 61–73 and accompanying text.

[34] *See infra* notes 61–73 and accompanying text.

[35] Calandrillo & Fulton, *supra* note 30, at 209. States started restricting the use of marijuana as early as 1911. *Id.* at 207. On April 29, 1911, Massachusetts became the first state to prohibit marijuana. Keith Wagstaff, *From* Reefer Madness *to Medical Marijuana: A Timeline of Weed Legalization in America*, THE WK. (Oct. 23, 2013), https://theweek.com/articles/458311/from-reefer-madness-medical-marijuana-timeline-weed-legalization-america [https://perma.cc/8A9B-QMUR]. Local governments followed suit not long after. Calandrillo & Fulton, *supra* note 30, at 207. Indeed, in 1914, El Paso, Texas passed the first local ordinance preventing people from possessing or selling the drug. *Id.* States' criminalization of the drug was due, at least in part, to the Uniform Law Commission's passage of the Uniform Narcotic Drug Act in 1932, which promoted the criminalization of marijuana at the state level. *Id.* at 208–09.

[36] Marijuana Tax Act, Pub. L. No. 75-238, 50 Stat. 551 (1937) (repealed 1969); *see* Calandrillo & Fulton, *supra* note 30, at 209 (explaining that the Marijuana Tax Act effectively criminalized the drug); Jordan Cunnings, Comment, *Nonserious Marijuana Offenses and Noncitizens: Uncounseled Pleas and Disproportionate Consequences*, 62 UCLA L. REV. 510, 518 (2015) (describing the Marijuana Tax Act as the first federal prohibition on marijuana).

[37] 3 CYRIL H. WECHT & GERARD HORNBY, FORENSIC SCIENCES § 31K.02 (2021). The Department of Treasury founded the Federal Bureau of Narcotics (FBN) in 1930. *Harry Jacob Anslinger*,

growing use of marijuana, began a war against the drug that would span approximately three decades.[38]

It was not until 1970, however, that Congress officially criminalized the drug at the federal level by passing the Controlled Substances Act (CSA).[39] The CSA prohibits the unauthorized importation and distribution of any controlled substance that Congress has determined provides little, if any, medicinal value and that has a high likelihood of abuse.[40] It consists of a five-schedule classification system.[41] The schedule in which the CSA classifies a drug determines the extent to which it is regulated and the severity of the penalties associated with its use.[42] Because the CSA classifies marijuana as a Schedule I drug, it is highly regulated and federal offenses involving the substance carry relatively harsh sentences.[43]

Shortly after the passage of the CSA, as part of his "tough on crime" policy, President Richard Nixon declared a "war on drugs."[44] Due in large part to

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DRUG ENF'T ADMIN. MUSEUM, https://deamuseum.org/anslinger/in-charge/ [https://perma.cc/MC34-AX2E]. Anslinger, who ran the FBN during the Great Depression, directed the agency's limited resources to defeating the world's most powerful drug rings and putting an end to interstate drug trafficking. *Id.*

[38] *See* WECHT & HORNBY, *supra* note 37, § 31K.02 (contrasting Anslinger's fear of marijuana with his lack of concern over heroin because heroin was historically seen as a problem experienced only by addicts and the African American population); *see also* Calandrillo & Fulton, *supra* note 30, at 208 (emphasizing the length of Anslinger's war against the drug). Among a number of other efforts, Anslinger was behind the notorious movie "Reefer Madness," a form of government-sponsored propaganda about the dangers of marijuana. WECHT & HORNBY, *supra* note 37, § 31K.02. The movie depicted a group of high school-aged teenagers whose lives were ruined by the drug. *Reefer Madness*, IMDB, https://www.imdb.com/title/tt0028346/ [https://perma.cc/39GN-87EN].

[39] Controlled Substances Act, Pub. L. No. 91-513, §§ 100-709, 84 Stat. 1242–1284 (1970) (codified as amended at 21 U.S.C. §§ 801–904). Congress implemented the Controlled Substances Act, also known as the Comprehensive Drug Prevention and Control Act, because it believed that controlled substances threaten "the health and general welfare of the American people." 21 U.S.C. § 801(2).

[40] *See* 21 U.S.C. § 811(c); Calandrillo & Fulton, *supra* note 30, at 209 (describing the criteria used to determine whether a drug should be listed in the CSA). The CSA defines a "controlled substance" as "a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V." 21 U.S.C. § 802(6).

[41] 21 U.S.C. § 812(a). Congress places drugs in one of the five schedules based on factors such as the likelihood of abuse, the impact that abuse of the drug can have on one's health, and its medical benefits. Calandrillo & Fulton, *supra* note 30, at 209. To be classified as a Schedule I drug, the substance must have "a high potential for abuse," "no currently accepted medical use in treatment in the United States," and "a lack of accepted safety for use of the drug or other substance under medical supervision." 21 U.S.C. § 812(b)(1)(A)–(C).

[42] Calandrillo & Fulton, *supra* note 30, at 209.

[43] *See* 21 U.S.C. § 812(c) (listing marijuana as a Schedule I drug); LAMPE, *supra* note 24, at 3 (indicating that simple possession of marijuana can result in a term of imprisonment of up to one year, whereas "illicit distribution of large quantities of marijuana" can result in a term of imprisonment of between ten years and life). For reference, other Schedule I drugs include heroin, LSD, and ecstasy. 21 U.S.C. § 812(c).

[44] *See* James Cooper, *The United States, Mexico, and the War on Drugs in the Trump Administration*, 25 WILLAMETTE J. INT'L L. & DISP. RESOL. 234, 252 (2018) (contrasting President Nixon with

President Nixon's framing of the drug problem as a national emergency, federal and state legislators passed a series of laws to encourage law enforcement personnel to arrest and prosecute drug offenders to the full extent of the law.[45] When President Ronald Reagan was elected in 1981, he significantly expanded President Nixon's anti-drug policy.[46] During his two terms in office, he introduced legislation designed to deter illegal drug use by implementing harsh penalties.[47]

Since then, the federal government's stance on marijuana has remained largely unchanged.[48] Indeed, lawmakers' attempts to remove marijuana from the CSA have had little success.[49]

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prior presidents who were not actively involved in drug policy). *See generally* Special Message to Congress on Drug Abuse Prevention and Control, PUB. PAPERS: NIXON, at 739 (June 17, 1971) (emphasizing the importance of federal legislation such as the CSA in combating the "national emergency" created by drug abuse). Significantly, the "war on drugs" disproportionately affected communities of color. *See* Cooper, *supra*, at 252 (stating that law enforcement and prosecutorial discretion in pursuing drug offenders "open[ed] the door to exacerbated racial disparities") (internal quotations omitted); Carrie Rosenbaum, *What (and Whom) State Marijuana Reformers Forgot: Crimmigration Law and Noncitizens*, 9 DEPAUL J. SOC. JUST. 1, 2–3 (2016) (noting that African Americans and Latinos were more likely to be imprisoned than their white counterparts and, in some jurisdictions, to be imprisoned for longer periods of time). For example, studies have shown that Black men typically receive "drug sentences that are 13.1 percent longer than sentences imposed for White men." H.R. 3884, 116th Cong. § 2(8) (2d Sess. 2020). Similarly, federal courts are approximately 6.5 times more likely to impose a sentence for cannabis possession on Latinos than non-Hispanic Whites. *Id.* This reality mirrors the racial bias that initially inspired the "war on drugs." *See* Calandrillo & Fulton, *supra* note 30, at 208 (stating that racial prejudice and anti-immigrant sentiments, particularly those directed at African American and Mexican American immigrants, were the driving force behind criminalizing marijuana).

[45] Cooper, *supra* note 44, at 252.

[46] *Id.* at 253. President Reagan was joined by his wife, Nancy Reagan, in promoting anti-drug initiatives. *Just Say No*, HISTORY, https://www.history.com/topics/1980s/just-say-no#section3 [https://perma.cc/6XU9-BL4J]. In the early 1980s, she launched the "Just Say No" campaign to dissuade children and young adults from experimenting with drugs. *Id.* The campaign, which lasted more than a decade, successfully heightened the public's concern over the nation's drug problem. *Id.*

[47] *See, e.g.*, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181; Drug-Free Workplace Act of 1988, Pub. L. No. 100-690, §§ 5151–5160, 102 Stat. 4181, 4304–4308; Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207; Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976.

[48] *See* Zachary Ford, Comment, *Reefer Madness: The Constitutional Consequence of the Federal Government's Inconsistent Marijuana Policy*, 6 TEX. A&M L. REV. 671, 675 (2019) (noting that the federal government remains insistent on criminalizing marijuana). *But see* Megan Brenan, *Support for Legal Marijuana Inches Up to New High of 68%*, GALLUP (Nov. 9, 2020), https://news.gallup.com/poll/323582/support-legal-marijuana-inches-new-high.aspx [https://perma.cc/K5W3-JT4D] (noting that, in 2020, 68% of American adults support legalizing marijuana compared to 12% in 1969). The federal government's insistence on criminalizing marijuana stems from its belief that the drug's proposed medical benefits are, at best, unfounded, that the drug is dangerous for users and their circles, and that people would buy and sell the drug in elicit markets. Ford, *supra*, at 675.

[49] Ford, *supra* note 48, at 675 (noting that there have been repeated efforts to reschedule marijuana during the past forty-eight years); *see, e.g.*, Marijuana Freedom and Opportunity Act, S. 3174, 115th Cong. (2018) (striking marijuana and tetrahydrocannabinols from Schedule I of the CSA); Strengthening the Tenth Amendment Through Entrusting States Act, S. 3032, 115th Cong. (2018) (providing

2. States Abandon the Federal Government's Harsh Stance on Marijuana

In the 1990s, evidence began to indicate that marijuana could provide various medical benefits and, as such, doctors began recommending the drug to their patients.[50] For example, studies showed that marijuana could help individuals cope with anxiety and depression, relieve pain, lessen seizure disorder symptoms, and slow the progression of Alzheimer's, among a number of other significant benefits.[51] Thus, in the late 1990s, states began to legalize marijuana for medicinal use.[52] Indeed, by 2018, thirty-three states, as well as the District of Columbia, had done so.[53] It was not until 2012, however, that states began to legalize marijuana for recreational use as well.[54] This development was due, at least in part, to the growing recognition that legalizing, and subsequently regulating, marijuana could be extremely profitable.[55]

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that the provisions of the CSA that apply to marijuana "shall not apply to any person acting in compliance with State law relating to the manufacture, production, possession, distribution, dispensation, administration, or delivery of marihuana"). Both Congress and the Drug Enforcement Administration have the authority to move a substance to a different schedule or to eliminate the substance from the CSA altogether. LAMPE, *supra* note 24, at 2.

[50] *See* Calandrillo & Fulton, *supra* note 30, at 210 (noting marijuana's potential for relieving chronic pain and nausea in particular); Silvia Irimescu, *Marijuana Legalization: How Government Stagnation Hinders Legal Evolution and Harms a Nation*, 50 GONZ. L. REV. 241, 251–52 (2015) (explaining that many nonusers of marijuana began to use the drug for medicinal purposes due to the increasing recognition of its medical utility).

[51] Irimescu, *supra* note 50, at 251–52. Other potential benefits of marijuana include treating glaucoma, improving lung health, stopping the spread of cancer, treating inflammatory bowel disease, enhancing metabolism, and improving lupus symptoms. *Id.*

[52] Calandrillo & Fulton, *supra* note 30, at 210. Through Proposition 215, California became the first state to legalize medical marijuana. *Id.* The initiative, which passed in November 1996, made it legal for patients, as well as their caregivers, to grow and use marijuana if their physicians recommended it. Lee Romney, *Prop. 215 Passed, but Uncertainty Hasn't*, L.A. TIMES (Jan. 5, 1997), https://www.latimes.com/archives/la-xpm-1997-01-05-mn-18103-story.html [https://perma.cc/5FVN-HZUG]. Other states, including "Alaska, Arizona, Colorado, Nevada, Oregon, and Washington," did the same shortly thereafter. Calandrillo & Fulton, *supra* note 30, at 210.

[53] Calandrillo & Fulton, *supra* note 30, at 210. The legalization of marijuana for medicinal use was a difficult process, as each state had to contend with difficult policy questions, including how to implement an effective patient registry system that would protect registrants from arrest. Ford, *supra* note 48, at 677.

[54] *See* Ford, *supra* note 48, at 677 (noting that it took sixteen years for states to begin legalizing recreational marijuana). The first states to legalize marijuana for recreational use were Washington and Colorado, but "Alaska, California, the District of Columbia, Maine, Massachusetts, Michigan, Nevada, and Oregon" followed suit shortly thereafter. Calandrillo & Fulton, *supra* note 30, at 210. In January 2020, Illinois became the eleventh state to legalize marijuana for recreational use. Alexander Bolton, *Illinois Becomes 11th State to Legalize Marijuana*, THE HILL (Jan. 1, 2020), https://thehill.com/homenews/state-watch/476444-illinois-becomes-11th-state-to-legalize-marijuana [https://perma.cc/9LKT-KF9D].

[55] *See* Marijuana Opportunity Reinvestment and Expungement Act of 2019, H.R. 3884, 116th Cong. § 2(5) (providing that "[l]egal cannabis sales totaled $9.5 billion in 2017 and are projected to reach $23 billion by 2022"); Irimescu, *supra* note 50, at 264, 266–67 (listing "monetary incentives" as one justification for legalizing or decriminalizing marijuana federally). The monetary incentive for legalizing marijuana is even greater when one considers the significant amount of money spent on its

Nevertheless, marijuana laws vary considerably from state to state.[56] Whereas some states remain firmly committed to banning the drug within their borders others have elected to do the opposite, legalizing marijuana for all purposes.[57] Other states fall somewhere in between.[58] Some, for example, have simply decriminalized the drug.[59] Generally, decriminalization refers to laws that minimize the likelihood that marijuana possession will result in a criminal record or incarceration.[60]

3. Addressing the Conflict Between Federal and State Marijuana Laws

Despite states' trend toward legalizing marijuana, the drug remains a Schedule I drug under the CSA.[61] As a result, it was unclear how marijuana-related conduct should be handled in states that legalized the drug.[62] Recogniz-

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prohibition. *See* Irimescu, *supra* note 50, at 265–66 (emphasizing the large sums of money spent on the "war on marijuana"). Indeed, the enforcement of marijuana laws has cost taxpayers approximately $3.6 billion a year, according to the American Civil Liberties Union. H.R. 3884 § 2(6). Nevertheless, the country has seen few benefits. *See* Irimescu, *supra* note 50, at 265–66 (noting that it is well established that incarceration is not the most effective means of preventing crime).

[56] W. Scott Railton, *Marijuana and Immigration*, 32 CRIM. JUST. 14, 14 (2017).

[57] *Compare* IND. CODE § 35-48-4-11 (2020) (providing that possession of marijuana generally constitutes a Class B misdemeanor), *with* CAL. HEALTH & SAFETY CODE §§ 11362.1, 11357 (removing penalties altogether for adults twenty-years or older who possess 28.5 grams or less of marijuana). In November 2020, Oregon became the first state to decriminalize possession of *all* drugs, including, but not limited to, heroin, cocaine, and methamphetamine. Scott Akins & Clayton Mosher, *Oregon Just Decriminalized All Drugs—Here's Why Voters Passed This Groundbreaking Reform*, U.S. NEWS (Dec. 10, 2020), https://www.usnews.com/news/best-states/articles/2020-12-10/oregon-just-decriminalized-all-drugs-heres-why-voters-passed-this-groundbreaking-reform [https://web.archive.org/web/20210212085033/https://www.usnews.com/news/best-states/articles/2020-12-10/oregon-just-decriminalized-all-drugs-heres-why-voters-passed-this-groundbreaking-reform]. The initiative passed with over 58% of the vote. *Id.*

[58] *See* Cunnings, *supra* note 36, at 521–22 (noting that some states have legalized the drug for medicinal use only or have simply lowered the penalties associated with its use).

[59] Alex Kreit, *Marijuana Legalization and Pretextual Stops*, 50 U.C. DAVIS L. REV. 741, 764 (2016).

[60] *Id.* at 765. As such, the term "decriminalization" typically does not mean the elimination of all penalties for marijuana possession. *Id.* Indeed, these states typically permit law enforcement personnel to continue to conduct searches and make arrests. *Id.* Thus, even in states where the legislature has decriminalized marijuana, police officers still have the power to conduct pretextual stops. *Id.*; *see Stop*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining "pretextual stop" as "[a] police stop of a person or vehicle for fabricated reasons that are calculated to forestall or preclude constitutional objections"). There are several ways that a state can decriminalize marijuana. Cunnings, *supra* note 36, at 526. Specifically, states can amend their statutes in ways that reduce the criminal penalties of marijuana possession, instruct police officers to issue a summons rather than an arrest warrant, or direct law enforcement not to prioritize marijuana possession. *Id.*; *Summons*, BLACK'S LAW DICTIONARY, *supra* (defining a summons as "[a] writ or process commencing the plaintiff's action and requiring the defendant to appear and answer").

[61] *See* 21 U.S.C. § 812(c) (listing marijuana as a Schedule I drug).

[62] *See* Calandrillo & Fulton, *supra* note 30, at 213 (describing the federal government's release of guidance on the matter).

ing this, the Department of Justice (DOJ) released several memoranda over the past several years to guide federal prosecutors operating in these states.[63]

The first, known as the Ogden Memorandum, stated that as a general matter, federal prosecutors should not devote valuable resources to pursuing those who are in "clear and unambiguous compliance" with state laws permitting the use of medicinal marijuana.[64] Nevertheless, the 2009 memorandum emphasized that the DOJ would remain committed to enforcing the CSA throughout the country.[65] In other words, it stated that the memorandum should not be construed as legalizing marijuana or as permitting "clear and unambiguous compliance with . . . state law" as a legal defense to a CSA violation.[66]

The second memorandum, the Cole Memorandum, which Deputy Attorney General James Cole released in 2011, reiterated much of the guidance that the Odgen Memorandum provided.[67] Specifically, the Cole Memorandum stat-

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[63] *Id.*; *see, e.g.*, Memorandum from Jefferson B. Sessions, Att'y Gen., Dep't of Just., to All U.S. Atty's, Marijuana Enforcement (Jan. 4, 2018) [hereinafter Sessions Memorandum]; Memorandum from James M. Cole, Deputy Att'y Gen., Dep't of Just., to All U.S. Att'ys, Guidance Regarding Marijuana Enforcement (Aug. 29, 2013) [hereinafter 2013 Cole Memo]; Memorandum from James M. Cole, Deputy Att'y Gen., Dep't of Just., to U.S. Att'ys, Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use (June 29, 2011) [hereinafter 2011 Cole Memo]; Memorandum of David W. Ogden, Deputy Att'y Gen., Dep't of Just., to Selected U.S. Att'ys, Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009) [hereinafter Ogden Memo].

[64] Ogden Memo, *supra* note 63, at 2. Attorney General Ogden provided, for example, that federal prosecutors need not focus enforcement efforts on people with serious illnesses such as cancer whose doctors recommended marijuana as part of their treatment plans and whose use is consistent with relevant state law. *Id.* That said, when marijuana-related conduct is accompanied by violence or the unlawful use of firearms, for example, the conduct will generally not be in "clear and unambiguous compliance" with state law. *Id.* Other factors that typically ensure that marijuana-related conduct will not be in "clear and unambiguous compliance" with state law include: "sales to minors; financial and marketing activities inconsistent with the terms, conditions, or purposes of state law, including evidence of money laundering activity and/or financial gains or excessive amounts of cash inconsistent with purported compliance with state or local law; . . . illegal possession or sale of other controlled substances; or ties to other criminal enterprises." *Id.*

[65] *Id.* This is the case, Attorney General Ogden noted, because Congress found that marijuana is "dangerous" and that its unlawful sale is a "serious crime." *Id.* at 1. The gravity of the crime is due, at least in part, to the fact that it provides substantial revenue to "large-scale criminal enterprises, gangs, and cartels." *Id.*

[66] *Id.* at 2.

[67] *See* 2011 Cole Memo, *supra* note 63, at 1 (stating that the Department of Justice (DOJ) will continue to enforce the CSA in all fifty states due to the seriousness of the illegal distribution and sale of marijuana). Indeed, the second memorandum expressly stated that the DOJ's opinion as to the efficient use of federal resources remained unchanged. *Id.* The DOJ released the 2011 memorandum because the Deputy Attorney General had allegedly received numerous requests for clarification on its position regarding the enforcement of the CSA in jurisdictions that had implemented, or had considered implementing, legislation authorizing the use of marijuana for medical purposes. *Id.* Additionally, the DOJ released the new memorandum because the "scope of commercial cultivation, sale, distribution, and use of marijuana for purported medical purposes" had expanded since the Ogden Memo's release in 2009. *Id.* at 1–2. Specifically, Deputy Attorney General Cole noted that several states had enacted legislation authorizing "large-scale, privately-operated industrial marijuana cultivation cen-

ed that federal prosecutors should not focus their enforcement efforts on those who rely on the substance for medicinal purposes only.[68]

In 2013, the DOJ released a third memorandum that set forth a list of enforcement priorities.[69] It directed DOJ attorneys and other law enforcement personnel to focus their efforts and resources on people and organizations that threatened one or more of the enforcement priorities, irrespective of state law.[70]

Finally, in January 2018, Attorney General Jefferson Sessions released a memorandum stating that, when exercising discretion as to whether to prosecute marijuana-related activity, prosecutors should simply adhere to the "well-established principles that govern all federal prosecutions."[71] These principles require federal prosecutors to consider all relevant factors in determining which cases to prosecute, including the severity of the crime, the likelihood of creating a deterrent effect, and the overall impact of the offenses on the community at large.[72] Given these general principles, Attorney General Sessions reasoned that previous guidance on marijuana enforcement, including the Ogden and Cole Memoranda, was no longer necessary.[73]

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ters" in the past year. *Id.* at 2. He declared, however, that, regardless of state law, individuals violate the CSA by "cultivating, selling, or distributing marijuana," as well as by knowingly facilitating these activities. *Id.*

[68] *Id.* at 1. Rather, federal prosecutors should direct their attention and resources to large-scale traffickers of illegal drugs, including marijuana. *Id.* The Cole Memorandum "hardly provoked a sea change in federal marijuana enforcement." Lauren Ouziel, *Democracy, Bureaucracy, and Criminal Justice Reform*, 61 B.C. L. REV. 523, 570 (2020) (noting that the 2013 memorandum did not create a discernable change in the number of federal marijuana prosecutions in Colorado).

[69] 2013 Cole Memo, *supra* note 63, at 1–2. The eight priorities listed in the 2013 memo include: (1) "[p]reventing the distribution of marijuana to minors"; (2) "[p]reventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels"; (3) "[p]reventing the diversion of marijuana from states where it is legal under state law in some form to other states"; (4) "[p]reventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity"; (5) "[p]reventing violence and the use of firearms in the cultivation and distribution of marijuana"; (6) "[p]reventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use"; (7) "[p]reventing the growing of marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands"; and (8) "[p]reventing marijuana possession or use on federal property." *Id.*

[70] *Id.* at 2. In an October 2014 memorandum, Director Wilkinson declared that the same eight priorities should guide the marijuana enforcement policy of U.S. Attorneys in Indian Country should the sovereign Indian Nations choose to legalize marijuana. Memorandum from Monty Wilkinson, Dir. of the Exec. Off. for U.S. Att'ys, to All U.S. Atty's, et al., Policy Statement Regarding Marijuana Issues in Indian Country (Oct. 28, 2014).

[71] Sessions Memorandum, *supra* note 63, at 1. Attorney General Benjamin Civiletti introduced these principles in 1980, and they are codified in the U.S. Attorneys' Manual. *Id.*; *see* U.S. Dep't of Just., U.S. Attorneys' Manual § 9-27.230 (1980).

[72] Sessions Memorandum, *supra* note 63.

[73] *Id.* In a footnote, Attorney General Session's memorandum made it clear that each of the memoranda—the Ogden Memorandum, both Cole Memoranda, and the Wilkinson Memorandum—were revoked. *Id.* at 1 n.1. Notably, during now-Attorney General Merrick Garland's Judiciary Committee

B. Immigration Consequences of Criminal Convictions for LPRs

Although LPRs possess many of the same rights and responsibilities as U.S. citizens, they can face severe immigration consequences as a result of criminal convictions.[74] Subsection 1 provides a brief summary of the American immigration system and describes the rights and responsibilities of LPRs.[75] Subsection 2 explains the immigration consequences of criminal convictions for LPRs.[76]

1. The U.S. Immigration System and LPR Status

U.S. immigration law is governed almost entirely by the Immigration and Nationality Act (INA).[77] Several federal administrative agencies have the authority to carry out the country's immigration laws, including the DOJ, the Department of Homeland Security (DHS), and the Department of State.[78]

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confirmation hearing, he indicated that he would dedicate fewer resources toward the enforcement of federal marijuana laws, suggesting a return to the Ogden and Cole Memoranda policies. Cloe Pippin, *Merrick Garland Signals New Stance on Marijuana Policy if Confirmed as Attorney General*, JDSUPRA (Mar. 4, 2021), https://www.jdsupra.com/legalnews/merrick-garland-signals-new-stance-on-8828319/ [https://perma.cc/98FP-F7GE]. He declined to confirm, however, whether he would actually reinstate the Cole Memorandum. *Id.*

[74] *See, e.g.*, 8 U.S.C. § 1182(a)(2)(A)(i) ("[A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of . . . a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . is inadmissible."); *id.* § 1227(a)(2)(B) (providing that "[a]ny alien who at any time after admission has been convicted of a violation of . . . any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . is deportable").

[75] *See infra* notes 77–89 and accompanying text.

[76] *See infra* notes 90–106 and accompanying text.

[77] Susan G. Roy, *Walk/Don't Walk: How the Legalization of Marijuana in New Jersey Will Affect Non-Citizens*, N.J. LAW, Oct. 2018, at 78. The Immigration and Nationality Act (INA) consolidated the country's immigration laws into one statutory framework. SARAH HERMAN PECK & HILLEL R. SMITH, CONG. RSCH. SERV., R45151, IMMIGRATION CONSEQUENCES OF CRIMINAL ACTIVITY 2 (2018), https://fas.org/sgp/crs/homesec/R45151.pdf [https://perma.cc/D5FA-2T4B]. The INA controls access to, and removal from, the United States, as well as the rights and responsibilities of noncitizens living in the country. JOSEPH MINSKY, INTRODUCTORY OVERVIEW OF IMMIGRATION LAW AND PRACTICE 14 (1989), Westlaw C394 ALI-ABA 1.

[78] Roy, *supra* note 77, at 78. DHS is comprised of ICE, USCIS, and CBP. PECK & SMITH, *supra* note 77, at 2. ICE is primarily responsible for enforcing immigration laws within the country's borders. *Id.* CBP, by contrast, oversees immigration enforcement at the border itself. *Id.* Finally, USCIS adjudicates applications for particular forms of relief and immigration benefits. *Id.* at 3. Prior to the enactment of the Homeland Security Act of 2002, which created the DHS, the Attorney General had the authority to implement the country's immigration laws, which he largely delegated to two agencies within the DOJ: the Immigration and Naturalization Services (INS) and the Executive Office for Immigration Review (EOIR). *Id.* at 2. The Homeland Security Act eliminated the INS and transferred the bulk of its responsibilities to the newly created DHS. *Id.*

The INA refers to noncitizens as "aliens."[79] It also divides aliens into three discrete categories: LPRs, nonimmigrants, and undocumented aliens.[80] LPRs, commonly referred to as "green card holders," are those who have been lawfully admitted into the United States and, after submitting an application and remaining in the country for a certain period of time, have been permitted to reside and work permanently in the United States.[81] A noncitizen can obtain LPR status through a variety of avenues, including family ties or the possession of a particular work-related skill.[82]

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[79] 8 U.S.C. § 1101(a)(3) (defining alien as "any person not a citizen or national of the United States"); *see Immigrant*, BLACK'S LAW DICTIONARY, *supra* note 60 (defining an "alien immigrant" as an "immigrant who has not yet been naturalized"). As such, this Note may, at times, refer to noncitizens as "aliens." *But see* Nicole Acevedo, *Biden Seeks to Replace 'Alien' with Less 'Dehumanizing Term' in Immigration Laws*, NBC NEWS (Jan. 22, 2021), https://www.nbcnews.com/news/latino/biden-seeks-replace-alien-less-dehumanizing-term-immigration-laws-n1255350 [https://perma.cc/JJ2U-T9MM] (noting that President Joe Biden proposed removing the term "alien" from U.S. immigration laws in a comprehensive new immigration reform bill); Adrian Florido, *Tracing the Shifting Meaning of 'Alien,'* NPR (Aug. 22, 2015), https://www.npr.org/sections/codeswitch/2015/08/22/432774244/tracing-the-shifting-meaning-of-alien [https://perma.cc/97PE-AD6B] (noting that immigrant rights advocates contend that the term "alien" is "derogatory and dehumanizing"); Joel Rose, *Immigration Agencies Ordered Not to Use Term "Illegal Alien" Under New Biden Policy*, NPR (Apr. 19, 2021), https://www.npr.org/2021/04/19/988789487/immigration-agencies-ordered-not-to-use-term-illegal-alien-under-new-biden-polic [https://perma.cc/9R66-9SUC] (explaining that President Biden ordered immigrant enforcement agencies to replace the term "illegal alien" with "undocumented noncitizen"); Elizabeth Rosenman, *This New Year, Let's Stop Using the Word 'Alien,'* THE HILL (Jan. 2, 2019), https://thehill.com/opinion/immigration/423570-this-new-year-lets-stop-using-the-word-alien [https://perma.cc/BML2-VZSD] (arguing that President Trump used the term "alien" to "pit his supporters against asylum seekers and other immigrants").

[80] MINSKY, *supra* note 77, at 14. A nonimmigrant is a person who has been lawfully admitted to the United States for a particular purpose. *Id.* at 15. Examples include students and tourists. *Id.* Nonimmigrants typically must keep a residence in their home country. *Id.* Moreover, they must intend to return there when their nonimmigrant status expires. *Id.* Undocumented aliens, on the other hand, are people who do not have permission to be present in the United States. *Id.* The distinction between different types of aliens is important because the INA handles each group differently—those who have permission to be in the United States are treated differently than those who do not. PECK & SMITH, *supra* note 77. For example, aliens who have been lawfully admitted to the United States may be removed from the country if they behave in ways that render them deportable, whereas noncitizens who have not been lawfully admitted may be excluded or removed if they engage in behavior rendering them inadmissible. *Id.*; *see Definition of Terms*, U.S. DEP'T OF HOMELAND SEC., https://www.dhs.gov/immigration-statistics/data-standards-and-definitions/definition-terms [https://perma.cc/6MWR-A8KN] (defining an inadmissible alien as one who is "seeking admission at a port of entry who does not meet the criteria in the INA for admission" and a deportable alien as "[a]n alien in and admitted to the United States subject to any grounds of removal specified in the Immigration and Nationality Act").

[81] *See* 8 U.S.C. § 1101(a)(20) ("The term 'lawfully admitted for permanent residence' means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed."). According to the DHS, there were an estimated 13.2 million LPRs living in the United States as of January 1, 2015. OFF. OF IMMIG. STAT., DEP'T OF HOMELAND SEC., LAWFUL PERMANENT RESIDENT POPULATION IN THE U.S.: JANUARY 2015, at 2 (2019), https://www.dhs.gov/sites/default/files/publications/lpr_population_estimates_january_2015.pdf [https://perma.cc/WJ2Y-PN5Y].

[82] MINSKY, *supra* note 77, at 15.

When noncitizens finally obtain LPR status, they possess many of the same rights and responsibilities as U.S. citizens.[83] Nevertheless, two significant distinctions remain: LPRs cannot vote and they can be deported following specific criminal convictions.[84]

Significantly, LPR status is a necessary step to obtaining U.S. citizenship.[85] LPR status, however, is not the only requirement for naturalization.[86] Noncitizens must demonstrate, among other things, that they continuously resided in the United States for a five-year period after receiving LPR status and that they were physically present in the country for at least half of that five-year period.[87] Particularly relevant here, noncitizens must also demonstrate "good moral character" for the five years preceding citizenship.[88] Because naturalization is a privilege rather than a right, the burden is on the noncitizen to demonstrate eligibility.[89]

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[83] *See* Maritza I. Reyes, *Constitutionalizing Immigration Law: The Vital Role of Judicial Discretion in the Removal of Lawful Permanent Residents*, 84 TEMP. L. REV. 637, 643–44 (2012) (providing that LPRs have the right to live and work in the United States, the duty to pay taxes, and the ability to register for selective service); Wilber A. Barillas, Note, *Collateral Damage: Drug Enforcement & Its Impact on the Deportation of Legal Permanent Residents*, 34 B.C. J.L. & SOC. JUST. 1, 7 (2014) (stating that LPRs share the same access to schools as American citizens and, if permitted by the state's legislature, can hold public office).

[84] Barillas, *supra* note 83, at 7; *see* Reyes, *supra* note 83, at 644 (noting that LPRs lack "representation in the political process"). Criminal convictions are not LPRs' only grounds for deportation, however. *See, e.g.*, 8 U.S.C. § 1227(a)(1)(B) (providing that noncitizens who are present in the United States in violation of U.S. immigration law are deportable); *id.* § 1227(a)(1)(E) (providing that any noncitizen who, within a certain period, has knowingly "encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is deportable"); *id.* § 1227(a)(3)(A) (providing that, generally, a noncitizen who has violated 8 U.S.C. § 1305, which requires noncitizens to notify the Attorney General of any address change, is deportable).

[85] Reyes, *supra* note 83, at 643.

[86] *See* 3 SHANE DIZON & POOJA DADHANIA, IMMIGR. L. SERV. 2D, § 14:102, Westlaw (database updated Feb. 2021) (laying out the requirements for naturalization). Naturalization is "the conferring of nationality of a state upon a person after birth, by any means whatsoever." 8 U.S.C. § 1101(a)(23).

[87] *See* DIZON & DADHANIA, *supra* note 86, § 14:102 (describing the continuous residence and physical presence requirements for naturalization). Another requirement is that the noncitizen exhibit knowledge of U.S. history and government, which is no simple task. *See id.* (describing the citizenship test); Alexa Lardieri, *2 of 3 Americans Wouldn't Pass U.S. Citizenship Test*, U.S. NEWS & WORLD REP. (Oct. 12, 2018), https://www.usnews.com/news/politics/articles/2018-10-12/2-of-3-americans-wouldnt-pass-us-citizenship-test [https://web.archive.org/web/20210301190203/https://www.usnews.com/news/politics/articles/2018-10-12/2-of-3-americans-wouldnt-pass-us-citizenship-test] (providing results from a study conducted by the Woodrow Wilson National Fellowship Foundation that found that only 39% of Americans would be able to pass a test that contained questions from the citizenship test).

[88] DIZON & DADHANIA, *supra* note 86, § 14:102; *see infra* notes 153–155 and accompanying text (describing the "good moral character" requirement).

[89] *See* Tuton v. United States, 270 U.S. 568, 578 (1926) (declaring that the Constitution does not give noncitizens the right to become U.S. citizens); DIZON & DADHANIA, *supra* note 86, § 14:106 (stating that this burden is justified because, once granted, citizenship is difficult to withdraw, and, therefore, the government has a legitimate interest in making sure that only qualified individuals are able to naturalize).

2. Immigration Consequences of Criminal Convictions

Noncitizens may be ineligible to enter or stay in the United States if they have committed particular criminal offenses.[90] Some offenses, when committed by a noncitizen lawfully admitted to the United States, may trigger deportation proceedings.[91] The criminal grounds for deportation are generally set forth in 8 U.S.C. § 1227.[92] In addition, certain criminal offenses may preclude a noncitizen from being admitted to the United States.[93] In other words, certain criminal offenses may make a noncitizen inadmissible.[94] The criminal grounds for inadmissibility are provided in 8 U.S.C. § 1182(a)(2).[95] The criminal grounds for both deportability and inadmissibility include individual crimes and categories of crimes.[96]

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[90] PECK & SMITH, *supra* note 77, at 4.

[91] *Id.* Moreover, the law provides that the Attorney General "shall" take into custody any noncitizen that is found to be deportable under certain provisions of the INA. 8 U.S.C. § 1226(c). When ICE takes noncitizens into custody, it places them in an ICE detention facility, such as state and federal prisons and private detention centers. AM. IMMIGR. COUNCIL, IMMIGRATION DETENTION IN THE UNITED STATES BY AGENCY 1, 3 (2020), https://www.americanimmigrationcouncil.org/sites/default/files/research/immigration_detention_in_the_united_states_by_agency.pdf [https://perma.cc/XQY6-6UKS]. As of December 9, 2019, almost 44,000 noncitizens were being held in over one hundred facilities and were kept there for an average of fifty-five days. *Id.* at 3–4. Noncitizens who were detained throughout their immigration proceedings, however, were often held for more than six months. *Id.* at 4. This is particularly troublesome given the poor conditions of ICE detention centers. *See id.* (describing a complaint that the American Immigration Council filed in 2018 alleging that the Denver Contract Detention Facility denied treatment to those with serious medical conditions and provided deficient mental health care for its detainees). Moreover, detained immigrants, particularly those in facilities located in remote areas of the United States, have difficulty obtaining legal representation. *Id.* During fiscal year 2015, for example, 48% of detainees were, at one point or another, being held "at least 60 miles from the nearest nonprofit immigration attorney who practiced removal defense." *Id.* Additionally, detainees' access to phone calls and visits is often limited, making it difficult for detainees who managed to retain counsel to communicate with them. Michael Kaufman, Note, *Detention, Due Process, and the Right to Counsel in Removal Proceedings*, 4 STAN. J. C.R. & C.L. 113, 127 (2008). Notably, the Attorney General does have discretion to authorize release from detention in some circumstances. Barillas, *supra* note 83, at 13. Generally, however, the Attorney General may not release those placed in detention for a drug-related offense. *Id.*

[92] 8 U.S.C. § 1227. The criminal grounds for deportability include, but are not limited to, high speed flight from an immigration checkpoint, failure to register as a sex offender, and certain firearm, domestic violence, and human trafficking offenses. *Id.*

[93] *Id.* § 1182.

[94] *See id.* (defining inadmissible aliens as those who "are ineligible to receive visas and ineligible to be admitted to the United States").

[95] *Id.* § 1182(a)(2). Examples of criminal grounds for inadmissibility include prostitution, human trafficking, and money laundering, among others. *Id.*

[96] PECK & SMITH, *supra* note 77, at 5, 7. An example of a category of crimes is "crimes involving moral turpitude," which can serve as the basis for both deportation and inadmissibility. *Id.* at 8. The phrase "crime involving moral turpitude" is not defined by the INA and, therefore, is subject to courts' interpretation. 6 CHARLES GORDON ET AL., IMMIGRATION LAW & PROCEDURE § 71.05 & n.197.1 (2019) (citing Jennifer Lee Koh, *Crimmigration Beyond the Headlines: The Board of Immigration Appeals' Quiet Expansion of the Meaning of Moral Turpitude*, 71 STAN. L. REV. ONLINE 267 (2019), https://review.law.stanford.edu/wp-content/uploads/sites/3/2019/03/71-Stan.-L.-Rev.-Online-Koh.pdf

The principal difference between the criminal grounds for deportability and inadmissibility is that to be deportable a noncitizen must have been convicted of the offense, whereas to be inadmissible a noncitizen need only admit to committing the offense or give the immigration authorities "reason to believe" that he or she committed the offense.[97] Because the INA defines the term "conviction" broadly, however, a variety of criminal dispositions can make an LPR deportable.[98] A noncitizen has been convicted if: (1) a judge or jury makes a formal finding of guilt; (2) the noncitizen pleads guilty or nolo contendere; or (3) the noncitizen admits enough facts to warrant a guilty finding.[99]

When a noncitizen engages in behavior that constitutes a deportability or inadmissibility ground, however, it does not automatically mean that the noncitizen cannot enter or stay in the country.[100] Rather, the INA sets forth various forms of relief, both mandatory and discretionary.[101] Some criminal activity, however, may preclude noncitizens from establishing their eligibility for relief.[102]

[https://perma.cc/U87Y-ZP9X]). "Moral turpitude" tends to reflect the "changing norms of behavior," and, as such, courts have adopted several different definitions of the phrase. *Id.* The Board of Immigration Appeals (BIA), an administrative body that adjudicates immigration proceedings, defined moral turpitude as "conduct that shocks the public conscience as being inherently base, vile, or depraved, and contrary to accepted rules of morality and the duties owed between persons and to society in general." *In re* Zaragoza-Vaquero, 26 I. & N. Dec. 814, 815 (BIA 2016). The U.S. Court of Appeals for the Ninth Circuit, on the other hand, defined a crime involving moral turpitude as either a crime "involving fraud" or a crime "involving grave acts of baseness or depravity." Ortega-Lopez v. Lynch, 834 F.3d 1015, 1018 (9th Cir. 2016) (quoting Robles-Urrea v. Lynch, 678 F.3d 702, 708 (9th Cir. 2012)). Despite the lack of a uniform definition, the Supreme Court held in *Jordan v. De George* that the phrase "crime involving moral turpitude" was not "void for vagueness." 341 U.S. 223, 230, 231–32 (1951); *see Vagueness Doctrine*, BLACK'S LAW DICTIONARY, *supra* note 60 (stating that the doctrine, which is based on the Due Process Clause, requires a criminal statute to "explicitly and definitely" provide the acts it prohibits "so as to provide fair warning and preclude arbitrary enforcement").

[97] PECK & SMITH, *supra* note 77, at 7; *see* 8 U.S.C. § 1182(a)(2)(C) (providing that "[a]ny alien who the consular officer or the Attorney General knows or has *reason to believe* . . . is or has been an illicit trafficker in any controlled substance . . . is inadmissible" (emphasis added)).

[98] Cunnings, *supra* note 36, at 532; *see* 8 U.S.C. § 1101(a)(48)(A) (defining the term "conviction" as "a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld where . . . a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and . . . the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed").

[99] 8 U.S.C. § 1101(a)(48)(A). A plea of nolo contendere, loosely translated to "no contest," is a plea in which the defendant "admits guilt for all purposes." *Nolo Contendere*, BLACK'S LAW DICTIONARY, *supra* note 60.

[100] PECK & SMITH, *supra* note 77, at 13.

[101] *Id.* The authority to grant relief typically belongs to either the Attorney General and, by way of delegation, the EOIR or USCIS. *Id.* Specifically, EOIR adjudicates applications for relief, whereas USCIS adjudicates applications for immigration benefits. *Id.* Examples of relief include, but are not limited to, "cancellation of removal, voluntary departure, withholding of removal, and asylum." *Id.*

[102] *Id.* Through cancellation of removal, the Attorney General can cancel the removal of LPRs who are either deportable or inadmissible under immigration law and who qualify for relief. *Id.* To be

Finally, LPRs may naturalize after living in the country continuously for a period of five years, in addition to satisfying a number of other requirements.[103] One such requirement is that LPRs possess good moral character for at least the five-year period leading up to their application for U.S. citizenship.[104] DOJ regulations require that a good moral character determination consider the "standards of the average citizen in the community of residence."[105] The INA goes one step further, setting forth a non-exhaustive list of conduct that would disqualify a noncitizen from demonstrating good moral character.[106]

C. Access to Counsel for Indigent Criminal Defendants

The Sixth Amendment to the U.S. Constitution states that "[i]n all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense."[107] Nevertheless, defendants were historically not entitled to court-

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eligible for cancellation of removal, an LPR must have: (1) at least five years of lawful permanent residence in the United States; (2) seven years of continuous lawful residence in the United States after having been lawfully admitted in any immigration status; and (3) no aggravated felony convictions. 8 U.S.C. § 1229b(a). "Aggravated felonies" are not simply offenses that are punishable as felonies; certain misdemeanors are considered aggravated felonies for immigration purposes as well. PECK & SMITH, *supra* note 77, at 10; *see* 8 U.S.C. § 1101(a)(13) (listing various aggravated felonies). Over time, Congress has consistently expanded the list of aggravated felonies to reach additional crimes. PECK & SMITH, *supra* note 77, at 10. Moreover, a grant of cancellation of removal is discretionary, and, although an applicant need not show a particular degree of hardship, an Immigration Judge will balance the factors that reflect negatively on the noncitizen's desirability as an LPR with those that reflect positively. GORDON ET AL., *supra* note 96, § 64.04 (citing *In re* C-V-T-, 22 I. & N. Dec. 7, 11 (BIA 1998)). The BIA stated that factors that favor a grant of cancellation of removal include family ties, length of residence in the country, military service, employment, and community service. *In re C-V-T-*, 22 I. & N. Dec. at 11. By contrast, adverse factors include criminal history and the nature of the conduct at issue. *Id.* Applicants have the burden of demonstrating that they deserve an exercise of discretion in their favor. GORDON ET AL., *supra* note 96, § 64.04.

[103] PECK & SMITH, *supra* note 77, at 22.

[104] *Id.* at 22–23.

[105] 8 C.F.R. § 316.10(a)(2) (2020). Good moral character does not, however, require "moral excellence," and one incident will not necessarily preclude a finding of it. *In re* Sanchez-Linn, 20 I. & N. Dec. 362, 366 (BIA 1991) (citing *In re* B-, 1 I. & N. Dec. 611 (BIA 1943)).

[106] PECK & SMITH, *supra* note 77, at 23. The DHS also promulgated a regulation providing its own list of criminal activity that would inhibit a finding of good moral character. *See* 8 C.F.R. § 316.10(b). There is some overlap between the criminal activities listed in the INA and those the DHS set forth. PECK & SMITH, *supra* note 77, at 23 n.138.

[107] U.S. CONST. amend. VI. It is well established that "the right to counsel is the right to the *effective* assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970) (emphasis added). In *Strickland v. Washington*, the U.S. Supreme Court established the standard for evaluating claims of ineffective assistance of counsel. 466 U.S. 668, 687 (1984). To establish ineffective assistance of counsel, the defendant first must demonstrate that counsel was "deficient." *Id.* In other words, the defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* Second, the defendant must demonstrate prejudice. *Id.* Specifically, the defendant must show that "counsel's errors were so serious as to deprive the defendant of a fair trial." *Id.* Notably, because the Sixth Amendment guarantee of effective assistance counsel is limited to criminal defendants, and deportation is considered a civil rather than a

appointed counsel for misdemeanor offenses.[108] In 1972, in *Argersinger v. Hamlin*, the Supreme Court expanded the class of persons entitled to court-appointed counsel under the Sixth Amendment.[109] Specifically, the Court held that indigent defendants charged with misdemeanor offenses are equally deserving of representation.[110] The Court's holding, however, was subject to an important limitation: it was only afforded to defendants sentenced to a term of imprisonment.[111] Shortly thereafter in *Scott v. Illinois*, the Supreme Court clarified its holding in *Argersinger*, stating that the Sixth Amendment's guarantee of assistance of counsel extends only to those defendants who are *actually sentenced* to a term of imprisonment, rather than those who merely faced the possibility.[112]

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criminal penalty, noncitizens facing removal are not entitled to court-appointed counsel in immigration court. INGRID EAGLY & STEVEN SHAFER, AM. IMMIGR. COUNS., ACCESS TO COUNSEL IN IMMIGRATION COURT 1 (2016), https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf [https://perma.cc/GN5F-G86D].

[108] *See* Irene Oritseweyinmi Joe, *Rethinking Misdemeanor Neglect*, 64 UCLA L. REV. 738, 753 (2017) (noting that, before 1972, courts interpreted the Constitution as guaranteeing the right to court-appointed counsel for felony offenses only).

[109] 407 U.S. 25, 36–37 (1972). In *Argersinger v. Hamlin*, the defendant was charged with "carrying a concealed weapon" in Florida, an offense that carried with it a prison sentence of up to six months, a fine of one thousand dollars, or a combination of the two. *Id.* at 26. Argersinger, who was not represented by counsel, was sentenced to ninety days in jail. *Id.* He subsequently brought a habeas corpus action before the Florida Supreme Court, claiming that he was denied his right to counsel under the Sixth Amendment. *Id.* The Florida Supreme Court, relying on the U.S. Supreme Court's decision in *Duncan v. Louisiana*, 391 U.S. 145, 159 (1968), held that only defendants facing trial for "non-petty offenses" punishable by a prison sentence of six months or more have a right to court-appointed counsel. *Argersinger*, 407 U.S. at 26–27. The U.S. Supreme Court reversed, holding that a person cannot be imprisoned for any offense, regardless of its severity, without having been represented at trial. *Id.* at 37. This does not apply, however, where there has been a "knowing and intelligent waiver." *Id.*

[110] *Argersinger*, 407 U.S. at 36–37.

[111] *See id.* at 37 ("We need not consider the requirements of the Sixth Amendment as regards the right to counsel where loss of liberty is not involved, however, for here petitioner was in fact sentenced to jail.").

[112] Scott v. Illinois, 440 U.S. 367, 373–74 (1979). In *Scott v. Illinois*, the defendant was convicted of theft for shoplifting merchandise worth under one hundred and fifty dollars. *Id.* at 368. The relevant Illinois statute provided that the maximum penalty for a shoplifting offense was a five-hundred-dollar fine, a one-year prison sentence or, alternatively, both a fine and imprisonment. *Id.* Although the defendant was merely sentenced to pay a fifty-dollar fine, he contended that he was entitled to court-appointed counsel because state law authorized a penalty of imprisonment. *Id.* at 368–69. The Supreme Court of Illinois dismissed this argument, citing the U.S. Supreme Court's holding in *Argersinger*. *Id.* at 369. Specifically, the Supreme Court of Illinois held that it was not required to apply *Argersinger* where a defendant was charged with an offense for which imprisonment was authorized but not actually imposed. *Id.* The U.S. Supreme Court agreed, holding that the Constitution does not compel a state trial court to provide court-appointed counsel to a defendant under these circumstances. *Id.* Notably, Justice Brennan, in his dissent, vehemently rejected the majority's "actual imprisonment" standard. *Id.* at 381–82 (Brennan, J., dissenting). In doing so, Justice Brennan noted that the authorized penalty, rather than the actual penalty, serves as a "better predictor of the stigma and other collateral consequences that attach to conviction of an offense." *Id.* at 382. Scholars have reiterated and expanded on Justice Brennan's concerns with the "actual imprisonment" standard. *See, e.g.*, B. Mitchell Simpson III, *A Fair Trial: Are Indigents Charged with Misdemeanors Entitled to Court Appointed*

The Supreme Court's holdings in *Argersinger* and *Scott* set the minimum requirements for the Sixth Amendment right to counsel.[113] Although states are free to afford greater protections, several states have elected not to do so, limiting the right to counsel only to those required by the U.S. Constitution.[114]

Notably, the Supreme Court's holdings in both *Argersinger* and *Scott* apply to all criminal defendants, irrespective of their immigration status.[115] As such, in states that limit the Sixth Amendment right to counsel to that which the U.S. Constitution requires, indigent, noncitizen defendants who are not sentenced to a term of imprisonment are not entitled to have counsel appointed in their defense, irrespective of the immigration consequences they are likely to face as a result.[116]

Moreover, even those indigent, noncitizen defendants who were able to obtain counsel have historically received limited assistance, as the majority of federal and state courts held that there is no requirement that defense attorneys advise their clients of the immigration consequences of criminal convictions.[117] This meant, for example, that defense attorneys could recommend ac-

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Counsel?, 5 ROGER WILLIAMS U. L. REV. 417, 435 (2000) (noting the impracticability of requiring trial judges to determine what the sentence will be before the trial has even taken place).

[113] Simpson, *supra* note 112, at 418; *see also* Alice Clapman, *Petty Offenses, Drastic Consequences: Toward a Sixth Amendment Right to Counsel for Noncitizen Defendants Facing Deportation*, 33 CARDOZO L. REV. 585, 586–87, 594 (2011) (noting that *Scott*'s holding left it up to the states to determine whether indigent defendants facing relatively minor charges would receive court-appointed counsel).

[114] Simpson, *supra* note 112, at 426; *see, e.g.*, ALA. R. CRIM. P. 6.1 (2020) (providing that an indigent defendant is "entitled to have an attorney appointed . . . in all criminal proceedings in which representation by counsel is *constitutionally required*" (emphasis added)); S.C. CODE ANN. § 17-3-10 (2020) ("Any person entitled to counsel under the Constitution of the United States shall be so advised and if it is determined that the person is financially unable to retain counsel then counsel shall be provided upon order of the appropriate judge unless such person voluntarily and intelligently waives his right thereto."). *But see, e.g.*, D.C. CODE § 11-2602 (2021) (providing the right to court-appointed counsel "[i]n all cases where a person *faces* a loss of liberty" (emphasis added)).

[115] *See Scott*, 440 U.S. at 373–74 (holding that the Sixth Amendment provides that indigent criminal defendants cannot be sentenced to a term of imprisonment if the State did not provide them with the right to appointed counsel); *Argersinger*, 407 U.S. at 37 (holding that people cannot be imprisoned unless they were represented by counsel at trial, with the exception of cases in which the defendant has knowingly and intelligently waived that right).

[116] *See Scott*, 440 U.S. at 373–74; *Argersinger*, 407 U.S. at 37.

[117] Cunnings, *supra* note 36, at 538; *see* Chaidez v. United States, 568 U.S. 342, 350–51 (2013) (noting that all ten federal appellate courts that considered the issue, as well as the appellate courts of just under thirty states, had determined that an attorney's failure to advise a client of the collateral consequences of a guilty plea does not constitute a Sixth Amendment violation). Only two state courts held that failing to caution a client regarding the collateral consequences of a guilty plea, including deportation, constituted a Sixth Amendment violation. *Chaidez*, 568 U.S. at 351; *see* State v. Paredez, 101 P.3d 799, 804 (N.M. 2004) (holding that, like affirmative misrepresentation, an attorney's failure to advise his or her client of the immigration consequences of a guilty plea is "deficient"); People v. Pozo, 746 P.2d 523, 529 (Colo. 1987) (stating that it is reasonable to require a defense attorney to research relevant immigration law when he or she knows that the client is a noncitizen because "attorneys must inform themselves of material legal principles that may significantly impact the particular

cepting a plea agreement without alerting their clients to the possibility of deportation.[118] This was due, at least in part, to the fact that the Sixth Amendment right to effective assistance of counsel is limited to the criminal law context, from which the American immigration system is distinct.[119]

This all changed with the Supreme Court's 2010 decision in *Padilla v. Kentucky*.[120] Jose Padilla, a Honduras native, had maintained LPR status for over forty years.[121] After pleading guilty to "misdemeanor possession of marijuana[,] misdemeanor possession of drug paraphernalia[, and] felony trafficking [of over five pounds] in marijuana," Padilla, who was represented by counsel at the time, faced the very realistic possibility of deportation.[122] In a post-

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circumstances of their clients"). The Supreme Court of New Mexico, for example, declined to distinguish between "misadvice and non-advice." *Paredez*, 103 P.3d at 804. Specifically, the court reasoned that both have the same result—regardless of whether an attorney provides a general warning that a guilty plea "could" impact immigration status or no advice at all, the defendant is left with incomplete information to an informed decision as to whether to plead guilty. *Id.* at 804–05. Additionally, the court noted that creating such a distinction would incentivize attorneys not to provide advice regarding immigration consequences because, if inaccurate, they could be found "ineffective." *Id.* at 805. Finally, the court emphasized that not requiring attorneys to advise their clients of the immigration consequences of pleading guilty would force their clients to determine these consequences themselves. *Id.* This is troubling, the court reasoned, because clients are undoubtedly less qualified to recognize these complex legal issues than their attorneys. *Id.*

[118] Cunnings, *supra* note 36, at 538.

[119] *Id.* at 539; *see* Padilla v. Kentucky, 559 U.S. 356, 365 (2010) (stating that although deportation is "intimately related" to the criminal process, "it is not, in a strict sense, a criminal sanction"). As such, although immigrants have a right to counsel in immigration court, they must bear the cost. EAGLY & SHAFER, *supra* note 107, at 1; *see* 8 U.S.C. § 1229a(b)(4)(B) (providing that "the alien shall have the privilege of being represented (at no expense to the Government) by . . . counsel . . . as the alien shall choose"). This has meant that a mere 37% of immigrants obtain legal representation to assist in their removal proceedings. EAGLY & SHAFER, *supra* note 107, at 1–2 (relying on data from more than 1.2 million deportation proceedings adjudicated between 2007 and 2012). Immigrants in detention fared even worse—only 14% of detained immigrants secured legal counsel. *See id.* at 2. These statistics are significant because non-detained, represented immigrants were almost five times more likely to obtain a favorable outcome than their unrepresented counterparts. *Id.* at 3. Similarly, detained, represented immigrants were nearly two times as likely as detained, unrepresented immigrants to obtain the relief they desired. *Id.*

[120] *See* Gabriel J. Chin, *Making* Padilla *Practical: Defense Counsel and Collateral Consequences at Guilty Plea*, 54 HOW. L.J. 675, 675 (2011) (stating that *Padilla*'s holding alone solidifies its characterization as a "landmark" decision). *See generally Padilla*, 559 U.S. 356.

[121] *Padilla*, 559 U.S. at 359. Padilla, who had served in the military during the Vietnam War, lived with his wife, three disabled children, and elderly mother-in-law in California. Padilla v. Commonwealth, 381 S.W.3d 322, 324 (Ky. Ct. App. 2012). He also had three adult children. *Id.*

[122] Petition for Writ of Certiorari at 3, *Padilla*, 559 U.S. 356 (No. 08-651). In addition to the three drug-related offenses, DHS had also charged Padilla, who had a valid Commercial Driver's License in Nevada, with "failing to have a weight and distance tax number . . . on his truck." *Id.* at 2–3. It was this truck that he used to haul nearly one thousand pounds of marijuana. *Id.* at 2. Padilla pleaded guilty to the three drug-related charges in exchange for the dismissal of the charge for operating a tractor trailer without a weight and distance tax number. *Id.* at 3. The plea agreement stipulated that Padilla would serve five years of his ten-year sentence and would be subject to probation for the remaining five. *Id.* Soon after Padilla entered the plea, he received an immigration detainer. *Id.*; *see Q&A: U.S. Immigration and Customs Enforcement Declined Detainer Outcome Report (DDOR),* DEP'T OF HOMELAND SEC.,

conviction proceeding, Padilla asserted that his attorney improperly assured him that he "did not have to worry about immigration status since he had been in the country so long."[123] The Supreme Court of Kentucky denied post-conviction relief, concluding that the Sixth Amendment does not shield criminal defendants from incorrect advice about the possibility of deportation.[124] The court reasoned that deportation is a mere "collateral" consequence of a criminal conviction.[125]

The U.S. Supreme Court granted certiorari to decide whether federal law required Padilla's counsel to warn his client that pleading guilty could result in deportation.[126] The Court found for Padilla, holding that noncitizen criminal

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https://www.dhs.gov/news/2017/03/20/qa-us-immigration-and-customers-enforcement-declined-detainer-outcome-report [https://perma.cc/56FK-JZLT] (describing an ICE detainer as a means of informing federal, state, or local law enforcement agencies of its intent to detain a noncitizen and requesting that the agency notify ICE before releasing him or her from criminal custody). The detainer listed Padilla's three drug-related charges as deportable offenses under 8 U.S.C. § 1227(a)(2)(B)(i), which, as the Court noted, is the deportation ground for "virtually every drug offense except for only the most insignificant marijuana offenses." *Padilla*, 559 U.S. at 359 n.1; *see* 8 U.S.C. § 1227(a)(2)(B)(i) ("Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . , other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.").

[123] *See Padilla*, 559 U.S. at 359 (explaining that Padilla's counsel's wrongdoing went beyond simply failing to advise him of the adverse consequences of pleading guilty to the charges he was facing). The language of the plea agreement validated Padilla's understanding that the guilty plea would not impact his immigration status. Petition for Writ Certiorari, *supra* note 122, at 3. Indeed, one of the conditions of the agreement was that Padilla would remain in Hardin County, Kentucky while he was on probation. *Id.*

[124] *See Padilla*, 559 U.S. at 359–60.

[125] *See id.* (noting that it was immaterial whether Padilla's counsel affirmatively provided incorrect advice about the possibility of deportation or whether he failed to advise him about the possibility at all, as neither would provide a basis for relief). Collateral consequences are those that fall outside the state trial court's sentencing authority. *Id.* at 364. Therefore, the Supreme Court of Kentucky concluded that under the Sixth Amendment counsel is not required to advise its clients of consequences over which the state trial court has no authority. *Id.* at 365. In other words, the client does not have a valid claim for ineffective assistance of counsel where counsel fails to advise the defendant of possible deportation consequences. *Id.* Numerous other courts had previously come to the same conclusion. *Id.*; *see, e.g.*, United States v. Gonzalez, 202 F.3d 20, 28 (1st Cir. 2000) (affirming prior decisions barring ineffective assistance of counsel claims based on counsel's failure to advise a client of the immigration consequences of a guilty plea), *abrogated by Padilla*, 559 U.S. 356; Commonwealth v. Frometa, 555 A.2d 92, 93 (Pa. 1989) (holding that counsel does not need to advise a client who is considering pleading guilty of the collateral consequences of doing so to provide adequate assistance), *abrogated by Padilla*, 559 U.S. 356. Other examples of collateral consequences include, but are not limited to, revocation of a driver's license, required registration with local governments after a sex crime conviction, ineligibility for public benefits, and prohibition on gun possession. AM. BAR ASS'N CRIM. JUST. SECTION, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS JUDICIAL BENCH BOOK: THE NATIONAL INVENTORY OF COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS 6–7 (2018), https://www.ncjrs.gov/pdffiles1/nij/grants/251583.pdf [https://perma.cc/4L5P-AS6P].

[126] *Padilla*, 559 U.S. at 360. In his petition for certiorari, Padilla asked the Court to consider two questions: (1) whether the mandatory deportation that results from pleading guilty to trafficking in marijuana is a "collateral consequence" that absolves a defense attorney of the duty to "investigate

defendants have a Sixth Amendment right to complete and accurate advice from their defense attorneys regarding the potential immigration consequences of a criminal conviction.[127] The Court limited its holding, however, by stating that a Sixth Amendment violation only occurs where the immigration consequences are clear.[128] Where the immigration consequences are not clear, a criminal defense attorney is simply required to advise their client that the criminal charges he or she is facing may carry unfavorable immigration consequences, without specifically outlining what those might be.[129]

Notably, the Court did not delineate which categories of criminal charges result in sufficiently clear immigration consequences so as to require a higher standard of advice from criminal defense attorneys.[130] What was clear from the decision, however, is that a noncitizen charged with marijuana possession implicates objectively clear immigration consequences.[131] The consequences are clear because, according to the INA, a noncitizen who has been convicted of a controlled substance offense, other than possession of thirty grams or less of marijuana for one's own use, is deportable.[132] Thus, a noncitizen charged with possession of marijuana is entitled under the Sixth Amendment to legal advice pertaining to the potential immigration consequences of the charge.[133]

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and advise," and (2) assuming that mandatory deportation is considered a "collateral consequence," whether a defense attorney's "gross misadvice" on the matter is sufficient justification for casting aside a guilty plea that was entered into in reliance on that advise. Petition for Writ Certiorari, *supra* note 122, at i.

[127] *Padilla*, 559 U.S. at 360, 366. Despite being a victory for immigrant rights advocates, *Padilla* has garnered criticism as well. *See* Cunnings, *supra* note 36, at 538 (referring to *Padilla* as a "groundbreaking" decision that "changed the doctrinal landscape significantly for noncitizens charged with crimes"). *But see* Chin, *supra* note 120, at 678 (noting that, even before *Padilla*, public defenders were already considerably overworked).

[128] *Padilla*, 559 U.S. at 369. The Court reasoned that immigration law is particularly complex, and many criminal defense attorneys, irrespective of whether they practice in state or federal court, may not be familiar with it. *Id.*

[129] *Id.* In his concurrence, Justice Alito expressed concern with setting forth a rule that hinges on determining whether the law is "succinct and straightforward." *See id.* at 375 (Alito, J., concurring) (arguing that the "vague, halfway test will lead to much confusion and needless litigation").

[130] Cunnings, *supra* note 36, at 540–41 (noting that doing so would be extremely difficult because different offenses result in different immigration consequences depending on a wide variety of factors).

[131] *Id.* at 541. The Court in *Padilla* held that Padilla's counsel could have readily discovered, by simply reading the text of the statute, whether the conviction would render him deportable. 559 U.S. at 368. Notably, some scholars contend that the statute in question, 8 U.S.C. § 1227(a)(2)(B)(i), is not quite so clear. *See, e.g.*, Maurice Hew, Jr., *Under the Circumstances:* Padilla v. Kentucky *Still Excuses Fundamental Fairness and Leaves Professional Responsibility Lost*, 32 B.C. J.L. & SOC. JUST. 31, 57 (2012) (setting forth a list of determinations Padilla's attorney would have had to make before even getting to the statute).

[132] 8 U.S.C. § 1227(a)(2)(B)(i); *see* Cunnings, *supra* note 36, at 541 (noting that 8 U.S.C. § 1227(a)(2)(B)(i) is implicated by the majority of minor marijuana offenses).

[133] *Padilla*, 559 U.S. at 360.

The Supreme Court reasoned that its holding would benefit both the noncitizen defendant and the State, as information regarding the possibility of deportation can help reach mutually beneficial agreements.[134] For example, where criminal behavior provides the basis for multiple charges, of which only a portion require deportation post-conviction, a defense attorney who possesses at least a cursory understanding of the intersection between criminal and immigration law may be able to obtain a plea agreement that minimizes the likelihood of deportation by avoiding convictions for offenses that automatically prompt removal proceedings.[135] Additionally, the possibility of deportation may encourage a noncitizen defendant to plead guilty to an offense that does not compel that result in exchange for the dropping of a charge that does, thus serving the State's interest in judicial economy as well.[136]

II. IMMIGRATION CONSEQUENCES OF MARIJUANA-BASED OFFENSES AND THE IMPACT OF MARIJUANA DECRIMINALIZATION ON LPRS

Although U.S. citizens charged with marijuana possession face increasingly lighter penalties, LPRs do not share in the good fortune—a marijuana possession charge can still lead to severe immigration consequences.[137] Section A of this Part describes the various ways marijuana-related convictions can impact LPRs.[138] Section B of this Part demonstrates that LPRs residing in states that have decriminalized the drug may be even more likely to face adverse immigration consequences.[139]

A. Immigration Consequences of Marijuana-Related Criminal Convictions for LPRs

Although many states have recognized that marijuana has some medicinal value, as well as a low likelihood of abuse, convictions for marijuana-related offenses can still have adverse immigration consequences for LPRs.[140] For ex-

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[134] *Id.* at 373.

[135] *Id.* For example, prosecutors could permit a noncitizen defendant to plead guilty to disorderly conduct rather than marijuana possession. Jason A. Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 CARDOZO L. REV. 1751, 1773 (2013). Similarly, a criminal defense attorney may be able to negotiate changes to the quantity of drugs charged in a way that minimizes the immigration consequences of the charge. *Id.* at 1774.

[136] *Padilla*, 559 U.S. at 373. Prosecutors also benefit significantly from negotiating plea deals because trials require more time and effort and involve more uncertainty as well. Cade, *supra* note 135, at 1773.

[137] *See, e.g.*, 8 U.S.C. § 1227(a)(2)(B)(i) (providing that a noncitizen who is convicted of violating a state or federal law "relating to a controlled substance" is deportable).

[138] *See infra* notes 140–159 and accompanying text.

[139] *See infra* notes 160–171 and accompanying text.

[140] *See* 8 U.S.C. § 1227(a)(2)(B)(i) (providing that a noncitizen who is convicted of violating a state or federal law "relating to a controlled substance" is deportable); Calandrillo & Fulton, *supra*

ample, 8 U.S.C. § 1227 lays out the types of offenses that make a noncitizen deportable.[141] Under § 1227(a)(2)(B), an LPR convicted of violating a state or federal law "relating to a controlled substance" is deportable.[142] The statute adopts the same definition of "controlled substance" as the CSA and, as a result, marijuana is considered a controlled substance for immigration purposes as well.[143] The statute does, however, contain a personal-use exception that provides that noncitizens convicted of a "single offense involving possession for one's own use of 30 grams or less of marijuana" are not deportable.[144]

Marijuana-related offenses can also have implications beyond deportation—they can make LPRs inadmissible.[145] An LPR convicted of violating a federal, state, or foreign controlled substance law is inadmissible.[146] Moreover,

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note 30, at 210 (describing the various medicinal benefits of marijuana). Indeed, between 2007 and 2012, the United States deported over 34,000 people whose worst conviction was for marijuana possession. Christie Thompson, *Get Caught with Pot, Face Deportation*, MARSHALL PROJECT (June 16, 2015), https://www.themarshallproject.org/2015/06/16/get-caught-with-pot-face-deportation [https://perma.cc/5E5R-HHCR].

[141] 8 U.S.C. § 1227.

[142] *Id.* § 1227(a)(2)(B)(i). The statute in full states that "[a]ny alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable." *Id.* Thus, this deportability ground requires that the statute under which the noncitizen is convicted "*relat[e] to*" a controlled substance, rather than that the criminal act *involve* a controlled substance. *See id.* (emphasis added) (providing that a noncitizen who has been convicted of violating a law "relating to a controlled substance" is deportable); *see also* GORDON ET AL., *supra* note 96, § 71.05 (highlighting the significance of the "relating to" language). Drug paraphernalia laws are illustrative of this difference. *See* GORDON ET AL., *supra* note 96, § 71.05. In 2015, the Supreme Court clarified that drug paraphernalia statutes typically do not "relat[e] to" a controlled substance unless an element of the crime is linked to a drug specifically defined in 21 U.S.C. § 802. Mellouli v. Lynch, 135 S. Ct. 1980, 1990–91 (2015); *see* GORDON ET AL., *supra* note 96, § 71.05 (explaining the Court's holding in *Mellouli*). Notably, even if it is possible for noncitizens to avoid a conviction for a controlled substance violation, they must also avoid the consequences of 8 U.S.C. § 1227(a)(2)(B)(ii), which states than noncitizens are deportable for becoming a drug addict or a drug abuser at any point after admission. *See* GORDON ET AL., *supra* note 96, § 71.05 (noting that this deportability ground is the only drug-related ground for which a noncitizen can be deported without committing a crime).

[143] *See* 8 U.S.C. § 1227(a)(2)(B) (stating that 21 U.S.C. § 802, one section of the CSA, defines the term "controlled substance[s]"); 21 U.S.C. § 812(c) (listing marijuana as a controlled substance under the CSA).

[144] 8 U.S.C. § 1227(a)(2)(B).

[145] *See id.* § 1101(a)(13)(C)(v) ("An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien . . . has committed an offense identified in section 1182(a)(2) of this title, unless since such offense the alien has been granted relief under section 1182(h) or 1229b(a) of this title . . . ."); *id.* § 1182(a)(2)(A)(i)(II) ("[A]ny alien convicted of, or who admits having committed, or who admits committing acts with constitute the essential elements of . . . a violation of . . . any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . is inadmissible.").

[146] *Id.* § 1182(a)(2)(A)(i)(II).

an LPR who admits to committing a controlled substance violation, or the essential elements of a controlled substance violation, is inadmissible as well.[147]

Additionally, marijuana-related offenses may bar an LPR from establishing eligibility for cancellation of removal, one of several forms of discretionary relief.[148] This is because LPRs are ineligible for cancellation of removal if they have been convicted of an aggravated felony.[149] The INA defines the term "aggravated felony" by listing crimes categorized as such.[150] One such crime is "illicit trafficking in a controlled substance."[151] Because the INA defines the term "aggravated felony" broadly, a misdemeanor drug charge for which a one-year prison sentence is authorized can qualify as an aggravated felony.[152]

Finally, marijuana-related offenses may hinder LPRs from naturalizing.[153] To establish eligibility for naturalization, LPRs must demonstrate good moral character for a statutorily provided period of time.[154] LPRs who violate a federal or state law pertaining to controlled substances during the statutory period will be unable to demonstrate good moral character.[155] Stated another way, a

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[147] *Id.*

[148] PECK & SMITH, *supra* note 77, at 15. Other forms of relief include adjustment of status, voluntary departure, withholding of removal, and asylum. *Id.* at 13.

[149] *See* 8 U.S.C. § 1229b(a)(3) (providing that to qualify for withholding of removal, an LPR must not have been convicted of an aggravated felony).

[150] *Id.* § 1101(a)(43). Crimes that qualify as an aggravated felony include: murder, rape, sexual abuse of a minor, money laundering, and any offense related to firearms or explosive materials. *Id.* An attempt or conspiracy to commit any of these crimes qualifies as an aggravated felony as well. *Id.* § 1101(a)(43)(U).

[151] *See id.* § 1101(a)(43)(B) (listing "illicit trafficking in a controlled substance (as defined in section 802 of [the CSA]), including a drug trafficking crime" as an aggravated felony); 21 U.S.C. § 802(6) (defining the term "controlled substance"). A "drug trafficking crime" is defined as a felony punishable under the CSA. 18 U.S.C. § 924(c)(2). A "felony" is a crime for which a term of imprisonment of more than one year is authorized. *Id.* § 3559(a).

[152] *See* 8 U.S.C. § 1101(a)(43) (defining aggravated felony). Recognizing the lack of proportionality that exists where a noncitizen is deported for marijuana possession, some states have enacted laws reducing the maximum punishment for misdemeanors by a single day. *See* Ingrid V. Eagly, *Criminal Justice in an Era of Mass Deportation: Reforms from California*, 20 NEW CRIM. L.R. 12, 29 (2017) (describing California's law redefining "misdemeanor"). For example, the California legislature amended the California Penal Code to provide that the maximum term of imprisonment for misdemeanor offenses is 364 days instead of the prior 365-day maximum. *Id.* The legislature recognized that, in many instances, deportation is implicated by a conviction of a crime for which a sentence of one year or longer is either feasible or imposed. *See id.* at 30 (noting that the term of imprisonment is critical not only for determining whether an offense is an "aggravated felony" but also whether it is a "crime of moral turpitude").

[153] *See* 8 U.S.C. § 1101(f) (stating that "[n]o person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established," committed one of the listed acts); BRADY, NIGHTINGALE & ADAMS, *supra* note 10, at 8 (describing the "good moral character" eligibility requirement for naturalization).

[154] *See* 8 U.S.C. § 1427(a) (stating that to naturalize, an applicant must have demonstrated good moral character for a period of five years).

[155] *Id.* § 1101(f) (stating that "[n]o person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established,"

controlled substance violation, if committed during a particular period of time, serves as a bar to establishing good moral character.[156] There is, however, an exception: the bar to establishing good moral character does not apply if the violation is for a single possession of thirty grams or less of marijuana.[157] Notably, even if a criminal disposition can be manipulated so as to avoid a finding of one of the conditional bars to establishing good moral character, DHS, in its discretion, can still find that a person does not have the requisite good moral character.[158] Because states are trending toward legalizing marijuana, the U.S. Citizenship and Immigration Services (USCIS) published guidance in April 2019 clarifying that a CSA violation for marijuana-based offenses is still a conditional bar to establishing good moral character despite changing state laws.[159]

B. The Impact of Marijuana Decriminalization on LPRs

Although most Americans stand to benefit from the states' decriminalization of marijuana, LPRs may actually be disadvantaged by it.[160] First, in states that have decriminalized, or even legalized, marijuana, LPRs may mistakenly believe that they can disclose marijuana use to DHS employees or other law enforcement personnel without consequence.[161] This, of course, is incorrect—

committed one of several listed acts); 12 U.S. CITIZENSHIP & IMMIGR. SERVS., USCIS POLICY MANUAL (2021), https://www.uscis.gov/policy-manual/volume-12-part-f-chapter-5 [https://perma.cc/RL92-CXCH] [hereinafter USCIS POLICY MANUAL]. Moreover, LPRs who conspire to violate, or aid and abet another person to violate, such laws cannot establish good moral character either. USCIS POLICY MANUAL, *supra*.

[156] *See* 8 U.S.C. § 1101(f); 21 U.S.C. § 841(a)(1) (providing that it is illegal for a "person [to] knowingly or intentionally . . . manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance"); *see also* 21 U.S.C. § 802(15) (defining "manufacture" as "the production, preparation, propagation, compounding, or processing of a drug or other substance"); *id.* § 802(22) (defining "production" as "the manufacture, planting, cultivation, growing, or harvesting of a controlled substance").

[157] 8 U.S.C. § 1101(f)(3).

[158] *See In re* Turcotte, 12 I. & N. Dec. 206, 208 (BIA 1967) (stating that the granting of discretionary relief is a "privilege" that is afforded to the applicant only where appropriate, rather than "an automatic act conditioned solely upon a showing of statutory eligibility").

[159] U.S. Citizenship and Immigr. Servs., Policy Alert on Controlled Substance-Related Activity and Good Moral Character Determinations, PA-2019-02 (Apr. 19, 2019), https://www.uscis.gov/sites/default/files/policymanual/updates/20190419-ControlledSubstanceViolations.pdf [https://perma.cc/T4PF-T4A7].

[160] *See, e.g.*, 8 U.S.C. § 1182(a)(2)(A)(i)(II) ("[A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of . . . a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country related to a controlled substance . . . is inadmissible."); *id.* § 1227(a)(2)(B)(i) (providing that "[a]ny alien who at any time after admission has been convicted of a violation of . . . any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . is deportable").

[161] BRADY, NIGHTINGALE & ADAMS, *supra* note 10, at 4. One popular way of helping to prevent this is simply to warn LPRs about the state of the law. *See id.* at 5 (providing that "[e]ducation is the

such an admission can have a disastrous impact on an LPR's immigration status.[162] Indeed, a mere admission is sufficient to trigger the inadmissibility ground.[163]

Moreover, the INA bars an LPR who engages in marijuana-based offenses from establishing good, moral character and, significantly, LPRs have ample opportunity to admit as much.[164] For example, to naturalize, an LPR must take part in an interview with USCIS officers during which the officers ask questions touching on all aspects of the naturalization process.[165] In doing so, officers ask the applicants about their criminal history and moral character, among a number of other topics.[166] In response, applicants are eagerly admitting to marijuana use, believing that it is entirely lawful to do so.[167] Additionally, USCIS is reportedly establishing systems to ensure that its agents are capturing these admissions from applicants.[168]

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very best defense"); *see, e.g.*, *Know Your Rights—Marijuana Use in Illinois*, ACLU ILL., https://www.aclu-il.org/en/know-your-rights/know-your-rights-marijuana-use-illinois [https://perma.cc/LA9J-V5EV] (advising noncitizens to consult an immigration attorney before buying marijuana).

[162] *See* 8 U.S.C. § 1182(a)(2)(A)(i) ("[A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of . . . a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . is inadmissible.").

[163] *See id.* As such, LPRs can only admit to using medical marijuana if they do not plan to travel outside of the United States or apply for U.S. citizenship. BRADY, NIGHTINGALE & ADAMS, *supra* note 10, at 5. The story of one man, who the Deferred Action for Childhood Arrivals program permitted to live and work in the United States, made news when he left the country for Mexico to secure his green card. Rob McMillan, *Corona Man Seeking Citizenship Not Allowed into U.S. After Admitting to Using Marijuana*, ABC 7 (July 31, 2019), https://abc7.com/society/ie-man-seeking-citizenship-remains-in-mexico-after-admitting-marijuana-use-/5431161/ [https://perma.cc/96GF-UK4Y]. Because he admitted to smoking marijuana, he was not only told that he could not re-enter the country but that he was ineligible to receive a visa as well. *Id.*

[164] *See* 8 U.S.C. § 1101(f) (stating that "[n]o person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established," committed one of several listed acts); *id.* § 1427(a) (stating that to naturalize, an applicant must have demonstrated good moral character for a period of five years).

[165] USCIS POLICY MANUAL, *supra* note 155, pt. B, ch. 3.

[166] *Id.* Other topics include: any absences from the United States after obtaining LPR status; knowledge of U.S. history and government; understanding of and commitment to the principles of the U.S. Constitution; membership in particular organizations; and willingness to take an "Oath of Allegiance" to the country. *Id.* In the interview, an applicant may, but need not, be accompanied by an attorney. *Id.*

[167] BRADY, NIGHTINGALE & ADAMS, *supra* note 10, at 8. Similarly, immigration officials are asking noncitizens about their participation in the marijuana industry in states or countries where it is legal. John Quinn, *Link to Marijuana Industry as Basis for Denial of Naturalization Application?*, NAT'L L. REV. (Apr. 22, 2019), https://www.natlawreview.com/article/link-to-marijuana-industry-basis-denial-naturalization-application [https://perma.cc/WBR4-TURX]. In Colorado, where marijuana is legal for both medicinal and recreational use, USCIS denied two immigrants' naturalization applications because it found that they lacked good moral character after discovering they were employed in the marijuana industry. *Id.*

[168] BRADY, NIGHTINGALE & ADAMS, *supra* note 10, at 8; *see also* Ana Campoy & Justin Rohrlich, *Immigrants Are Being Denied US Citizenship for Smoking Legal Pot*, QUARTZ (Apr. 20,

Second, although the Supreme Court's 2010 decision in *Padilla v. Kentucky* attempted to ensure that noncitizens would receive complete and accurate advice regarding the potential immigration consequences of pleading guilty, the decriminalization of marijuana may mean that many indigent LPRs will not receive any advice at all.[169] This is because in states that provide nothing more than the Sixth Amendment right to counsel, criminal defendants, irrespective of their immigration status, will not be appointed public defenders unless a sentence of imprisonment is imposed.[170] As more and more states decriminalize marijuana, such that imprisonment is no longer a possibility, noncitizen criminal defendants will be less likely to receive critical advice regarding the severe immigration consequences of pleading guilty to seemingly minor offenses.[171]

III. Federal, State, and Local Solutions

Proportionality is inherently lacking where an LPR is found deportable for low-level offenses such as marijuana possession.[172] Although the federal government has the authority to address this issue, it has historically failed to do so.[173] As such, states have had to step in, implementing a range of measures

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2019), https://qz.com/1600262/immigrants-are-being-denied-us-citizenship-for-smoking-legal-pot/ [https://perma.cc/7FKJ-73G7] (noting that the most straightforward way for USCIS to find out if applicants have used drugs is simply to ask).

[169] Cunnings, *supra* note 36, at 545. This issue is exacerbated by the fact that some defendants waive their right to attorney, assuming that marijuana possession charges are "as minor as a traffic ticket." Thompson, *supra* note 140.

[170] *See* Scott v. Illinois, 440 U.S. 367, 373–74 (1979) (holding that the Sixth Amendment requires only that no indigent criminal defendant be forced to serve time in prison unless the state has appointed him or her counsel).

[171] *See id.*; Cunnings, *supra* note 36, at 545*; see also* Terry Carter, *Virginia Court's No-Jail Policy for Marijuana Possession Could Have Consequences for Immigrants*, AM. BAR ASS'N J. (Mar. 13, 2017), https://www.abajournal.com/news/article/virginia_courts_no-jail_policy_for_marijuana_possession_could_have_conseque [https://perma.cc/7AQD-AUMF] (noting that the Arlington General District Court's new policy of not seeking jail time for possession of limited amounts of marijuana is "rubb[ing] up against tough immigration laws enacted years ago"); Rachel Weiner, *Get Caught with Pot, Don't Go to Jail: Why Not Everyone Is Happy*, WASH. POST (Mar. 10, 2017), https://www.washingtonpost.com/local/public-safety/get-caught-with-pot-dont-go-to-jail-why-not-everyone-is-happy/2017/03/09/81c0e6a6-fecb-11e6-8ebe-6e0dbe4f2bca_story.html [https://perma.cc/58RJ-342B] (stating that Arlington County, Virginia's policy that those found possessing small amounts of marijuana for the first time will not face jail time "could have dire consequences for immigrants, both legal and undocumented").

[172] *See* Cunnings, supra note 36, at 517 (arguing that the harsh penalties imposed on those convicted of marijuana possession "violate principles of proportionality and justice that should be guiding our nation's immigration policies"). The concept of proportionality, which is rooted in the Eighth Amendment, is the idea that "punishment for crime should be graduated and proportioned to [the] offense." Graham v. Florida, 560 U.S. 48, 59 (2010) (quoting Weems v. United States, 217 U.S. 349, 367 (1910) (alteration in original)).

[173] *See* Ford, *supra* note 48, at 676 (noting that the federal government remains committed to categorizing marijuana as a Schedule I drug under the CSA).

designed to address the issue.[174] Section A of this Part describes these measures, arguing in favor of those that go so far as to provide direct representation to noncitizen defendants charged with minor offenses.[175] Section B of this Part describes one of the more recent attempts at descheduling marijuana at the federal level and notes that, given the Democratic Party's control of both the House and Senate, its passage has become a realistic possibility.[176]

A. Cities and States Attempt to Compensate for the Federal Government's Shortcomings

States have attempted to limit the immigration consequences of low-level marijuana offenses in various ways.[177] New York, for example, dedicated funds toward providing legal services providers with the support necessary to advise their noncitizen clients as to the potential immigration consequences of a criminal conviction.[178] In order to do so, the state created the country's first statewide system of immigration assistance centers to educate criminal and family court lawyers about immigration law.[179] The six Regional Immigration Assistance Centers located throughout the state are responsible for helping attorneys and other legal services providers develop strategies for limiting or eliminating the threat of removal.[180]

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[174] *See infra* notes 177–193 and accompanying text.

[175] *See infra* notes 177–193 and accompanying text.

[176] *See infra* notes 194–203 and accompanying text.

[177] *See* Kendra Sena, *State Criminal Law and Immigration: How State Criminal-Justice Systems Can Cause Deportations, or Limit Them*, ALBANY L. SCH. 1, 2–4, https://www.albanylaw.edu/centers/government-law-center/Immigration/explainers/Documents/State-Criminal-Law-and-Immigration.pdf [https://perma.cc/4WDW-4TEG] (May 6, 2019) (describing different measures states have taken to address this issue). One example is pardons. *Id.* at 3. For many crimes, a state governor's pardon can effectively eliminate a conviction for immigration purposes. *Id.* In Georgia, for example, the Board of Pardons and Parole adjusted its pardon process in a ways that would protect noncitizens facing deportation for low-level convictions. *Id.* First, the Board made the process available to those convicted of misdemeanors. *Id.* Second, it waived the eligibility waiting period that had previously applied to the state's pardon process. *Id.* Notably, Georgia is not the only state implementing these types of changes. *See id.* (recognizing that state governors in both New York and California have commuted the sentences of noncitizen defendants convicted of crimes that carry severe immigration consequences).

[178] *Id.* at 2; N.Y. STATE OFF. OF INDIGENT LEGAL SERVS., REQUEST FOR PROPOSALS 2 (2020), https://www.ils.ny.gov/files/RIAC%20RFP%20Final%20010720.pdf [https://perma.cc/Y6TS-W5Q7] [hereinafter OFFICE OF INDIGENT LEGAL SERVICES]. The impetus behind the effort was the recognition that "[e]ven convictions for minor offenses and violations can have disastrous and irrevocable consequences for a noncitizen client despite dispositions that may appear innocuous or even favorable in terms of the penalty imposed." N.Y. STATE OFF. OF INDIGENT LEGAL SERVS., *supra*, at 2. This was particularly important for New York, the state reasoned, because of its large immigrant population. *See id.* at 4 (noting that noncitizens make up approximately 22% of the state's total population, which is well above the nation's average of 13%).

[179] Sena, *supra* note 177, at 2. The state expanded the program to cover family court proceedings as well because immigration status has the potential to directly affect important issues such as custody, visitation, and adoption. N.Y. STATE OFF. OF INDIGENT LEGAL SERVS., *supra* note 178, at 3.

[180] N.Y. STATE OFF. OF INDIGENT LEGAL SERVS., *supra* note 178, at 6.

California, by contrast, has taken a different approach to protecting noncitizens charged with marijuana-related offenses.[181] The California legislature enacted a law requiring prosecutors to attempt to avoid adverse immigration consequences when negotiating plea deals.[182] The law also calls for defense counsel to advance arguments pertaining to the collateral consequences of a proposed disposition to help ensure that immigration-related issues are brought to the prosecutor's attention.[183]

Individual prosecutor's offices have implemented comparable practices.[184] The district attorneys' offices in Brooklyn and Philadelphia, for example, contracted with immigration attorneys to teach the cities' prosecutors how to reduce the prospect of deportation for noncitizen offenders charged with low-level, nonviolent offenses.[185]

Although these programs are undoubtedly encouraging, they do fall short of providing counsel to indigent noncitizen defendants charged with low-level marijuana offenses.[186] For example, in New York, indigent noncitizens may not have an attorney who knows to take full advantage of the resources the various Centers provide.[187] Similarly, many noncitizen defendants in California will not have counsel to inform the state's prosecutors of any immigration-related concerns.[188]

This is not true, however, of Seattle and King County, which established the first Legal Defense Network in 2017.[189] The majority of the Network's funds are

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[181] *See* Sena, *supra* note 177, at 2 (describing California's use of prosecutorial discretion).

[182] 2015 Cal. Stat. 5365; Sena, *supra* note 177, at 2. The law has received some praise. *See, e.g.*, Eagly, *supra* note 152, at 29 (explaining that the law normalizes consideration of collateral consequences and is faster and more efficient than the alternative: allowing individual county's prosecutors' offices to develop their own procedures for handling immigration consequences).

[183] Eagly, *supra* note 152, at 27.

[184] Sena, *supra* note 177, at 2. In Baltimore, Maryland, for example, the state's attorney told prosecutors to take into account the "unintended collateral consequences that [their] decisions have on [the] immigrant population." *Id.*

[185] *Id.* at 2–3. The policy in Brooklyn requires prosecutors to warn defense attorneys about the possible immigration consequences their clients face and to attempt to prosecute noncitizen defendants in ways that achieve an "immigration-neutral disposition," so long as they are not jeopardizing public safety. Alan Feuer, *Brooklyn Moves to Protect Immigrants from Deportation Over Petty Crimes*, N.Y. TIMES (Apr. 24, 2017), https://www.nytimes.com/2017/04/24/nyregion/brooklyn-immigrants-deportation-crime.html [https://perma.cc/A9TL-M85K]. The Brooklyn district attorney's office reasoned that the office is "unflaggingly committed to equal and fair justice for *all* the people of Brooklyn, and that unquestionably includes [its] immigrant population no less than any other." *Id.* (emphasis added).

[186] *See* Sena, *supra* note 177, at 2–3 (describing New York and California's solutions).

[187] *See* N.Y. STATE OFF. OF INDIGENT LEGAL SERVS., *supra* note 178, at 6 (noting that New York's program functions by providing legal support to criminal defense and family law attorneys).

[188] *See* Eagly, *supra* note 152, at 27 (explaining that the California law requires defense counsel to present issues of collateral consequences to prosecutors).

[189] *Mayor Durkan and Executive Constantine Announce Expanded Seattle-King County Immigrant Legal Defense Network Grantees*, KING CNTY. GOV'T (May 29, 2019), https://www.kingcounty.gov/elected/executive/constantine/news/release/2019/May/29-immigrant-defense.aspx [https://perma.cc/5FUB-JPYS]. In addition to providing legal representation, the Network is also working to

dedicated to providing legal representation for low-income residents who are either detained, facing deportation, or at risk of losing their immigration status.[190] The Network has already made a significant difference—between October 2017 and April 2019, the Network provided direct legal representation to more than 350 individuals and general legal advice to an additional 339.[191]

Other jurisdictions, particularly those that only guarantee counsel to individuals covered by the Sixth Amendment, should follow suit.[192] Unlike New York's Centers and California's prosecutorial discretion mandate, which are at their most effective when immigrants have counsel in the first place, Seattle and King County's Legal Defense Network tackles the issue head on—it provides legal representation to those who otherwise would not receive it during a time when it matters most.[193]

B. The MORE Act Makes Descheduling Marijuana at the Federal Level a Possibility

Certainly, descheduling marijuana at the federal level would address the issue.[194] Although numerous proposals have been introduced over the past several years, none have been successful.[195] In July 2019, then-Senator Kamala D. Harris and Representative Jerrold Nadler, Chairman of the House Judiciary Committee, introduced the Marijuana Opportunity Reinvestment and Expungement Act (MORE Act or Act).[196] The Act is one of the most extensive marijuana

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combat the anti-immigrant rhetoric that has spread throughout the country under the Trump administration. *Id.* The Network also provides mental health examinations to immigrants who are either facing or at risk of deportation. *Id.* The Network was created in response to the significant increase in deportations experienced in Washington. *Id.* Indeed, in 2017, Washington experienced a 25% rise in arrests and an 88% rise in deportations. *Id.* Notably, the arrests and deportations were not limited to immigrants with criminal convictions. *See id.* (noting that this included a 210% rise in arrests and a 29% rise in deportations of noncitizens who did not even have a criminal record).

[190] *Id.* Some funds, however, are given to organizations to bolster their capability to offer legal services to the county's immigrant population. *Id.* Examples of these organizations include Kids in Need of Defense, the Northwest Immigrant Rights Project, and Entre Hermanos. *Id.*

[191] *Id.* The Network spent approximately $1.8 million to do so. *Id.*

[192] *See id.* (highlighting the numerous benefits of the Network).

[193] *Compare id.* (stating that Seattle and King County's Legal Defense Network provides direct legal representation), *with* Sena, *supra* note 177, at 2–3 (setting forth the limitations of New York and California's solutions).

[194] *See* Cunnings, *supra* note 36, at 561–62 (explaining that the inadmissibility and deportability grounds for controlled substances-related conduct reference the CSA).

[195] *See, e.g.*, Marijuana Freedom and Opportunity Act, S. 3174, 115th Cong. (2018) (striking marijuana and tetrahydrocannabinols from Schedule I of the CSA); Ending Federal Marijuana Prohibition Act of 2017, H.R. 1227, 115th Cong. ("limit[ing] the application of Federal laws to the distribution and consumption of marihuana").

[196] Marijuana Opportunity Reinvestment and Expungement Act of 2019, H.R. 3884, 116th Cong.; Press Release, Congressman Jerry Nadler, Nadler & Harris Introduce Comprehensive Marijuana Reform Legislation (July 23, 2019), https://nadler.house.gov/news/documentsingle.aspx?DocumentID=394017 [https://perma.cc/QQH8-C8TC]. At the time, the bill had over fifty cosponsors. Javier Hasse,

reform bills ever before Congress.[197] If passed, the MORE Act would put an end to the federal prohibition of marijuana by removing it from the CSA altogether.[198] In so doing, the Act would protect LPRs and other noncitizens from adverse immigration consequences resulting from minor marijuana offenses.[199] Thus, noncitizens living in states that have decriminalized marijuana would no longer be at a disadvantage.[200]

Although the MORE Act passed the House, it seemed unlikely, at least prior to the 2020 presidential election, that it would pass the Senate.[201] The

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Key Committee in Congress Approves Marijuana Legalization Bill, FORBES (Nov. 20, 2019), https://www.forbes.com/sites/javierhasse/2019/11/20/marijuana-legalization-judiciary-committee/#e763ea32c35a [https://perma.cc/9M87-5T68]. In January 2021, Vice President Kamala Harris made history when she became the first woman and the first woman of color to hold the office of the Vice President of the United States. Lisa Lerer & Sydney Ember, *Kamala Harris Makes History as First Woman and Woman of Color as Vice President*, N.Y. TIMES (Jan. 20, 2021), https://www.nytimes.com/2020/11/07/us/politics/kamala-harris.html [https://perma.cc/HTA3-2JLF].

[197] Press Release, *supra* note 196.

[198] *See* H.R. 3884 (stating that one purpose of the Act is "[t]o decriminalize and deschedule cannabis").

[199] *See id.* ("For purposes of the immigration laws . . . cannabis may not be considered a controlled substance, and an alien may not be denied any benefit or protection under the immigration laws based on any event, including conduct, a finding, an admission, addiction or abuse, an arrest, a juvenile adjudication, or a conviction, relating to cannabis, regardless of whether the event occurred before, on, or after the effective date of this Act."). As part of its comprehensive nature, the MORE Act sets forth several corresponding amendments to the INA. *Id.* Additionally, the MORE Act would implement a 5% sales tax on marijuana and marijuana-related products, the revenue from which would establish the Opportunity Trust Fund. Press Release, *supra* note 196. The Opportunity Trust Fund includes three grant programs: (1) the Community Reinvestment Grant Program; (2) the Cannabis Opportunity Grant Program; and (3) the Equitable Licensing Grant Program. *Id.* The first, the Community Reinvestment Grant Program, is intended to help those most negatively impacted by the War on Drugs. *See id.* (explaining that the program would provide "job training, re-entry services, legal aid, literacy programs, youth recreation, mentoring, and substance use treatment"). The second, the Cannabis Opportunity Grant Program, would provide loans to "socially and economically disadvantaged" small business owners that work within the marijuana industry. *Id.* Finally, the Equitable Licensing Grant Program would support programs that "minimize barriers to marijuana licensing and employment for the individuals most adversely impacted by the War on Drugs." *Id.* Notably, the Act protects against other, non-immigration related collateral consequences of marijuana-based convictions as well. *See id.* (noting that the Act prohibits the denial of federal public benefits based on a marijuana offense as well).

[200] *See generally* H.R. 3884. As such, the Act has received support from the Immigrant Legal Resource Center and the ACLU, among other advocacy organizations. Press Release, *supra* note 196.

[201] *See* Ryan Bort, *Inside the Weed Legalization Bill the House of Representatives Just Passed*, ROLLING STONE (Dec. 4, 2020), https://www.rollingstone.com/culture/culture-features/more-act-marijuana-legalization-bill-vote-1097723/ [https://perma.cc/T74N-6VSN] (providing that the House of Representatives passed the MORE Act by a vote of 228-164, falling largely along party lines); Kris Kane, *Is the SAFE Banking Act on the Ropes? And Other Federal Updates*, FORBES (Feb. 24, 2020), https://www.forbes.com/sites/kriskrane/2020/02/24/is-the-safe-banking-act-on-the-ropes-and-other-federal-updates/#5d92d8d21e15 [https://perma.cc/4HYE-ZQS4] (stating that even if the House approves the MORE Act, its likelihood of being approved by the Senate is "between slim and nonexistent"); Sean Williams, *Sorry, the MORE Act Has No Chance of Becoming Law*, NASDAQ (Nov. 30, 2019), https://www.nasdaq.com/articles/sorry-the-more-act-has-no-chance-of-becoming-law-2019-11-30 [https://perma.cc/74B5-WJ8F] (noting that Senate Majority Leader Mitch McConnell does not plan

Democratic Party, however, narrowly took control of the Senate in January 2021 with its victories in the Georgia state runoff elections.[202] As such, advocates of marijuana legalization may finally have a reason to be optimistic.[203]

CONCLUSION

Despite the categorization of marijuana as a Schedule I drug under the CSA, a growing number of states have legalized it for medical and recreational use. Other states have simply decriminalized the drug, lowering the penalties associated with its use. These changes are significant, as most defendants will face fewer meaningful consequences as a result. LPR offenders, however, do not share in the good fortune. For one, they may mistakenly believe that they can safely admit to marijuana use when communicating with USCIS agents and other law enforcement officials in reliance on the jurisdiction's decriminalization statute, risking their immigration status in the process. Additionally, lowering the penalties associated with marijuana-related conduct means that fewer noncitizen defendants will be appointed a public defender to advise them of the adverse immigration consequences of pleading guilty to seemingly minor charges. Although the federal government certainly has the power to address this issue by legalizing the drug, it has yet to do so. Accepting this, several states have taken significant steps in the right direction. They could, however, go farther in tackling the problem.

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to allow marijuana legislation to reach the Senate floor, and, as such, the Act has "no chance of becoming law").

[202] Natalie Fertig, *Democratic-Led Senate Could Clear a Path to Marijuana Legalization*, POLITICO (Jan. 8, 2021), https://www.politico.com/news/2021/01/08/senate-democrats-marijuana-legislation-456074 [https://perma.cc/7QYA-PJJ7].

[203] *See id.* (noting that Democrats plan to raise the Act in the 117th Congress).