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-
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.


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. This applies to LPRs who, despite having many of the same rights and responsibilities as U.S. citizens, experience equally harsh outcomes.

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. 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. 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. 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. This belief is misguided, however, because a mere admission to marijuana-related conduct can lead to significant immigration consequences.

This Note explores the negative effects of marijuana decriminalization on LPRs. 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 LPRs.

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). See id. (holding that indigent criminal defendants who are not sentenced to prison are not entitled to court-appointed counsel under the Sixth Amendment).
14 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.
15 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.”).
16 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. Additionally, it illustrates the circumstances in which the Sixth Amendment of the Constitution entitles a criminal defendant to a public defender. Part II of this Note describes the specifically adverse immigration consequences LPRs can face for marijuana-related offenses. Moreover, it explains how decriminalization may actually disadvantage LPRs. 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. Additionally, it analyzes the Marijuana Opportunity Reinvestment and Expungement Act, a recent attempt at ending the federal ban on marijuana.

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. Section A of this Part demonstrates that although many states have legalized marijuana, the federal government continues to classify it as a controlled substance. 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. Section B provides background information about the U.S. immigration system and LPR status specifically. 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.

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 “marijuana.” 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.  

A. The Trend Toward Legalizing Marijuana

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

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. Similarly, in 1937, Congress passed the Marijuana Tax Act, the first federal ban on marijuana. Its enactment is generally credited to Harry J. Anslinger, the first Commissioner of the Federal Bureau of Narcotics. Anslinger, who was troubled by the...
growing use of marijuana, began a war against the drug that would span approximately three decades.\textsuperscript{38}

It was not until 1970, however, that Congress officially criminalized the drug at the federal level by passing the Controlled Substances Act (CSA).\textsuperscript{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.\textsuperscript{40} It consists of a five-schedule classification system.\textsuperscript{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.\textsuperscript{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.\textsuperscript{43}

Shortly after the passage of the CSA, as part of his “tough on crime” policy, President Richard Nixon declared a “war on drugs.”\textsuperscript{44} Due in large part to

\textsuperscript{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].


\textsuperscript{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).

\textsuperscript{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).

\textsuperscript{42} Calandrillo & Fulton, supra note 30, at 209.

\textsuperscript{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).

\textsuperscript{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.\textsuperscript{45} When President Ronald Reagan was elected in 1981, he significantly expanded President Nixon’s anti-drug policy.\textsuperscript{46} During his two terms in office, he introduced legislation designed to deter illegal drug use by implementing harsh penalties.\textsuperscript{47}

Since then, the federal government’s stance on marijuana has remained largely unchanged.\textsuperscript{48} Indeed, lawmakers’ attempts to remove marijuana from the CSA have had little success.\textsuperscript{49}
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

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 marijuana”). 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.


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.


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-

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).


\(^58\) 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. Att’ys, 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

68 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.

69 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).

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. Att’y’s, et al., Policy Statement Regarding Marijuana Issues in Indian Country (Oct. 28, 2014).


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. Subsection 1 provides a brief summary of the American immigration system and describes the rights and responsibilities of LPRs. Subsection 2 explains the immigration consequences of criminal convictions for LPRs.

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

U.S. immigration law is governed almost entirely by the Immigration and Nationality Act (INA). 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.

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.

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”).

See infra notes 77–89 and accompanying text.

See infra notes 90–106 and accompanying text.


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.” It also divides aliens into three discrete categories: LPRs, nonimmigrants, and undocumented aliens. 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. A noncitizen can obtain LPR status through a variety of avenues, including family ties or the possession of a particular work-related skill.

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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”).


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. Nevertheless, two significant distinctions remain: LPRs cannot vote and they can be deported following specific criminal convictions.

Significantly, LPR status is a necessary step to obtaining U.S. citizenship. LPR status, however, is not the only requirement for naturalization. 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. Particularly relevant here, noncitizens must also demonstrate “good moral character” for the five years preceding citizenship. Because naturalization is a privilege rather than a right, the burden is on the noncitizen to demonstrate eligibility.

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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.


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

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. ONLINE267 (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”).


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. 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. DOJ regulations require that a good moral character determination consider the “standards of the average citizen in the community of residence.” The INA goes one step further, setting forth a non-exhaustive list of conduct that would disqualify a noncitizen from demonstrating good moral character.

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.” Nevertheless, defendants were historically not entitled to court-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.
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. In 1972, in *Argersinger v. Hamlin*, the Supreme Court expanded the class of persons entitled to court-appointed counsel under the Sixth Amendment. Specifically, the Court held that indigent defendants charged with misdemeanor offenses are equally deserving of representation. The Court’s holding, however, was subject to an important limitation: it was only afforded to defendants sentenced to a term of imprisonment. 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.

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].


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.*


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. 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.

Notably, the Supreme Court’s holdings in both *Argersinger* and *Scott* apply to all criminal defendants, irrespective of their immigration status. 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.

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. 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. Paredes, 101 P.3d 799, 804 (N.M. 2004) (holding that, like affirmative misrepresentation, an lawyer’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. 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.

This all changed with the Supreme Court’s 2010 decision in Padilla v. Kentucky. Jose Padilla, a Honduras native, had maintained LPR status for over forty years. 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. In a post-

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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. Eaglesy & 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. Eaglesy & 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.


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.” 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. The court reasoned that deportation is a mere “collateral” consequence of a criminal conviction.

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. The Court found for Padilla, holding that noncitizen criminal...

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.\textsuperscript{127} The Court limited its holding, however, by stating that a Sixth Amendment violation only occurs where the immigration consequences are clear.\textsuperscript{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.\textsuperscript{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.\textsuperscript{130} What was clear from the decision, however, is that a noncitizen charged with marijuana possession implicates objectively clear immigration consequences.\textsuperscript{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.\textsuperscript{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.\textsuperscript{133}
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{137} Section A of this Part describes the various ways marijuana-related convictions can impact LPRs.\textsuperscript{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.\textsuperscript{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.\textsuperscript{140} For ex-

\begin{itemize}
  \item[\textsuperscript{134}] Id. at 373.
  \item[\textsuperscript{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.
  \item[\textsuperscript{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.
  \item[\textsuperscript{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).
  \item[\textsuperscript{138}] See infra notes 140–159 and accompanying text.
  \item[\textsuperscript{139}] See infra notes 160–171 and accompanying text.
  \item[\textsuperscript{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
\end{itemize}
ample, 8 U.S.C. § 1227 lays out the types of offenses that make a noncitizen deportable. Under § 1227(a)(2)(B), an LPR convicted of violating a state or federal law “relating to a controlled substance” is deportable. 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. 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.

Marijuana-related offenses can also have implications beyond deportation—they can make LPRs inadmissible. An LPR convicted of violating a federal, state, or foreign controlled substance law is inadmissible. Moreover,
an LPR who admits to committing a controlled substance violation, or the essential elements of a controlled substance violation, is inadmissible as well.\textsuperscript{147}

Additionally, marijuana-related offenses may bar an LPR from establishing eligibility for cancellation of removal, one of several forms of discretionary relief.\textsuperscript{148} This is because LPRs are ineligible for cancellation of removal if they have been convicted of an aggravated felony.\textsuperscript{149} The INA defines the term “aggravated felony” by listing crimes categorized as such.\textsuperscript{150} One such crime is “illicit trafficking in a controlled substance.”\textsuperscript{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.\textsuperscript{152}

Finally, marijuana-related offenses may hinder LPRs from naturalizing.\textsuperscript{153} To establish eligibility for naturalization, LPRs must demonstrate good moral character for a statutorily provided period of time.\textsuperscript{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.\textsuperscript{155} Stated another way, a

\textsuperscript{147} Id.
\textsuperscript{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.
\textsuperscript{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).
\textsuperscript{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).
\textsuperscript{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).
\textsuperscript{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”).
\textsuperscript{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).
\textsuperscript{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).
\textsuperscript{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—
such an admission can have a disastrous impact on an LPR’s immigration sta-
tus.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 ques-
tions touching on all aspects of the naturalization process.165 In doing so, offic-
ers ask the applicants about their criminal history and moral character, among a
number of other topics.166 In response, applicants are eagerly admitting to ma-
rijuana 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

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 con-
spiracy 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 admit-
ted 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 es-
tablished,” 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 Alle-
giance” 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?,
basis-denial-naturalization-application [https://perma.cc/WBR4-TURX]. In Colorado, where mariju-
a 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 em-
ployed 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. 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. 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.

III. FEDERAL, STATE, AND LOCAL SOLUTIONS

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

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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).


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. 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. 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.

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. 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. 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. 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.

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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. The California legislature enacted a law requiring prosecutors to attempt to avoid adverse immigration consequences when negotiating plea deals. 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.

Individual prosecutor’s offices have implemented comparable practices. 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.

Although these programs are undoubtedly encouraging, they do fall short of providing counsel to indigent noncitizen defendants charged with low-level marijuana offenses. 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. Similarly, many noncitizen defendants in California will not have counsel to inform the state’s prosecutors of any immigration-related concerns.

This is not true, however, of Seattle and King County, which established the first Legal Defense Network in 2017. 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. 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.

Other jurisdictions, particularly those that only guarantee counsel to individuals covered by the Sixth Amendment, should follow suit. 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.

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

Certainly, descheduling marijuana at the federal level would address the issue. Although numerous proposals have been introduced over the past several years, none have been successful. 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). The Act is one of the most extensive marijuana
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
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.

MICHELLE A. KAIN

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