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WORKING PAPER ON IMMIGRATION CONSEQUENCES OF GUILTY PLEAS OR CONVICTIONS IN NEW YORK COURTS

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Introduction – A different kind of re-entry problem

The immigration consequences of a guilty plea or conviction in a New York court have increased dramatically in recent years. This is because in recent years the U.S. Congress has several times amended the federal immigration laws – in particular in 1996 when it enacted the Antiterrorism and Effective Death Penalty Act (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) – to enhance the potential immigration penalties for criminal conduct. In addition to enacting these harsher immigration laws, the federal government has adopted stricter policies on enforcement of these laws in recent years, most particularly following the tragic events of September 11, 2001.

As a result of these changes in the immigration laws and in enforcement of these laws, now more than ever a New York immigrant who pleads guilty even to a minor criminal offense will become subject -- often unknowingly due to the failure of New York's legislature and courts to ensure that noncitizens are informed of the immigration consequences of a criminal conviction -- to the risk of detention and removal from the United States. And, in many cases, this risk may become realized only years later when the individual innocently does something, such as take a trip out of the country, that brings the person's past encounter with New York's criminal justice system to the attention of federal immigration authorities, as in the following case described earlier this year in the New York Times:

> *Cornelius Johnson came to New York from Jamaica in 1993. As a legal resident, he settled in upstate New York with his extended family. In 1997, he was arrested for criminal possession of marijuana. In an agreement with the state, he pleaded guilty and was sentenced to time served. Neither the lawyer or the judge mentioned that in accepting a plea bargain, he could be deported. And guess what? Today, eight years after the conviction and with a clean record, Mr. Johnson faces mandatory deportation.*
>
> *Cornelius Johnson's case is emblematic of a plea bargaining system in New York that is unfair to immigrants. When plea bargaining works, it works well: In exchange for a reduction in charges, a defendant pleads guilty, eliminating the expense and uncertainty of a trial for both him and the state. But there's one big problem for defendants in New York's immigrant community: Unlike many other states, New York does not inform immigrant criminal defendants that part of what they bargained for may include deportation.*
>
> *Since 1996, when Congress altered immigration laws, any noncitizen – including people who have legally lived in the United States since they were babies – convicted of a broad range of crimes including petty offenses like turnstile jumping, shoplifting or possession of a small quantity of marijuana may be subject to deportation.*
>
> *Unfair as the law is, it is even worse for immigrants in New York, where some misdemeanors are defined as aggravated felonies under federal immigration laws, which subject them to mandatory deportation. Furthermore, in the case of some lesser crimes,*

a judge cannot review an immigrant's personal circumstances and grant a deportation waiver if the crime was committed within seven years of the alien's admission into the United States.

. . .

So a legal immigrant who came to America as a teenager with his family, pleaded guilty to possession of a marijuana cigarette a few years after his arrival and traveled back to his country as an adult to visit an elderly grandmother, could be barred from re-entering the United States. Had the court told the young man that he could be deported, he may not have pleaded guilty, and he certainly wouldn't have left the country. ("Forced to Go Home Again," Bryan Lonegan, The New York Times, Op-Ed, February 27, 2005).

This story of what is currently happening to Cornelius Johnson illustrates how the immigration consequences of an admission or conviction in a New York court present a different kind of re-entry problem from the other collateral consequences being investigated and discussed in this colloquium. First, there is the obvious – these particular consequences are faced only by individuals who are not U.S. citizens, even though they may have lived nearly their whole lives here or everything that matters to them (e.g., family, job, community) may be in this country. Second, the potential consequence of detention and removal from the United States poses a risk of *total* defeat of the capacity to re-integrate into one's family, community, and society here in this country. Third, this risk may attach to conviction of minor offenses – misdemeanors or even violations in many cases -- or, as will be discussed later in this paper, in some cases even to New York dispositions that are not considered convictions under state law.

In addition, though, the Cornelius Johnson story demonstrates that not all New York immigrants who admit or are convicted of crimes are immediately targeted or identified for possible immigration detention and removal, and thus their cases may present more traditional re-entry issues faced by individuals who are released back into society. Like Mr. Johnson, they may not be placed in removal proceedings until years later when they do something -- like take a trip out of the country, or apply for citizenship or to replace a lost green card – that brings them to the attention of indiscriminating federal immigration enforcement agents who unfortunately rarely, if ever, exercise any prosecutorial discretion. And, even then, they may have legitimate legal claims or defenses to fight detention and removal in their removal hearing before an Immigration Judge. However, as will be discussed later in this paper, the mere risk of detention and removal, even if not immediately presented or carried out, may operate to prevent or make more difficult successful re-integration of such New York immigrants into their families, communities, and society. Indeed, the risk of immigration detention and removal may sadly come up many years after the person has been released back into society, as in Mr. Johnson's case, when removal might wind up defeating the re-entry of an individual who has already successfully re-integrated.

Overview of current law

Understanding the immigration consequences of a particular criminal disposition can be very complicated and often involves careful analysis of the elements of the state offense and the state's particular disposition of the case under federal immigration law. This section, and the attached one-page Immigration Consequences of Convictions Summary Checklist, are meant only to provide an overview. In order to understand the immigration consequences of a particular New York criminal case disposition for a particular immigrant, one must first comprehend the distinction between the criminal grounds of deportability and the criminal grounds of inadmissibility and when each apply.

1. Deportability v. inadmissibility

There are two separate parts of the immigration law that may trigger removal based on a criminal offense—the grounds of "deportability" (INA 237(a), 8 U.S.C. 1227(a)) and the grounds of "inadmissibility" (INA 212(a), 8 U.S.C. 1182(a)). Which set of grounds applies to an individual, or whether both apply, depends on the individual's particular immigration status and situation.

The deportability grounds are applicable to individuals who have been "lawfully admitted" to the United States, e.g., a lawful permanent resident with a so-called green card.

The grounds of inadmissibility apply to everyone else, even individuals who are in the United States but who have not been lawfully admitted to the United States. In addition, the inadmissibility grounds may be applied to lawfully admitted immigrants when such individuals travel abroad and seek re-admission, as in the above-described case of Cornelius Johnson.

2. Criminal grounds for deportation of lawfully admitted immigrants

The criminal grounds for deportation of a lawfully admitted individual, such as a lawful permanent resident green card holder, are listed in INA Section 237(a)(2), 8 U.S.C. 1227(a)(2), and include the following:

> Conviction of any *controlled substance offense* (other than a single offense of simple possession of 30 grams or less of marijuana), whether felony or misdemeanor.
>
> Conviction of a *crime involving moral turpitude*, whether felony or misdemeanor, committed within five years of admission to the United States and punishable by a year in prison—This category could include crimes in many different New York offense categories, e.g., crimes in which either an intent to steal or to defraud is an element (such as theft and forgery offenses); crimes in which bodily harm is caused or threatened by an intentional or willful act, or serious bodily harm is caused or

threatened by an act of recklessness (such as murder, rape, and certain manslaughter and assault offenses); and most sex offenses. In New York, Class A misdemeanors as well as felonies are punishable by a year so could, if deemed to involve moral turpitude, make an individual deportable if committed within five years after admission.

Conviction of *two crimes involving moral turpitude*, whether felony or misdemeanor, committed at any time and regardless of actual or potential sentence.

Conviction of a *firearm or destructive device offense*, whether felony or misdemeanor.

Conviction of a *crime of domestic violence, stalking, child abuse, child neglect, or child abandonment,* whether felony or misdemeanor, *or a violation of an order of protection*, whether issued by a civil or criminal court.

Conviction of an *aggravated felony*—This category, which overlaps with many of the above categories and which has particularly harsh consequences because convictions falling into the category usually bar any possible waiver of deportation, includes not only crimes such as murder, rape, and sexual abuse of a minor, but also many drug or firearm offenses, regardless of sentence; any crime of violence, theft or burglary offense, or obstruction of justice offense for which an individual gets a prison sentence of one year or more; fraud or deceit offenses where the loss to the victim(s) exceeds $10,000, as well as an expanding list of other specific offenses. As a result of broad interpretations of the statutory definition of "aggravated felony," the term may include even some state misdemeanors such as a misdemeanor drug possession offense (preceded by a prior drug offense), misdemeanor sale of marijuana, or a misdemeanor petty larceny offense with a one-year prison sentence, actual or suspended.

3. Criminal grounds for inadmissibility of those seeking lawful admission

A noncitizen who is not lawfully present but who has some claim to lawful status (e.g. married to a U.S. citizen) might be made permanently ineligible to be admitted as a lawful immigrant if convicted of certain crimes, or if s/he merely admits having committed a crime. The criminal grounds for inadmissibility are listed in INA Section 212(a)(2), 8 U.S.C. 1182(a)(2), and include the following:

Conviction or admitted commission of any *controlled substance offense*, whether felony or misdemeanor.

Conviction or admitted commission of a *crime involving moral turpitude*, whether felony or misdemeanor (subject to a one-time petty offense exception).

Conviction of *two or more offenses of any type* with aggregate sentences to imprisonment of at least five years.

Prostitution and commercialized vice.

4. Criminal bars on eligibility for U.S. citizenship

In the case of a lawful permanent resident immigrant, ineligibility for U.S. citizenship is an additional possible negative consequence of a criminal case due to the requirement that an immigrant demonstrate good moral character. See INA Section 316(a), 8 U.S,C. 1427(a). If deemed to have been convicted of an "aggravated felony" (see discussion of this immigration law term-of-art in section 2 above), a lawful permanent resident is permanently barred from being able to show the requisite good moral character for U.S. citizenship. See INA Section 101(f)(8), 8 U.S.C. 1101(f)(8). A lawful permanent resident could also be deemed ineligible for citizenship based on conviction or admission of other offenses that fall into the criminal inadmissibility grounds, or other evidence of conduct indicating lack of good moral character coming out of a New York court proceeding. Citizenship adjudicators are required to consider an individual's conduct during the period of residence and good moral character required for a grant of citizenship, which is generally five years, but citizenship adjudicators will often look back even further in time.

As is the case with removal consequences, recent legislation has made citizenship ineligibility an even more important consequence than it was in the past. Primary examples are the new eligibility rules for various federal and state government benefits that now or in the near future may wholly or partially bar noncitizens. Thus, for instance, a lawful permanent resident immigrant who has AIDS and who now or in the future may need federal assistance for the disabled or Medicaid in order to survive and put together his or her life after completing any penal sentence may be adversely affected by a criminal disposition that will lead to ineligibility for citizenship.

5. What counts as a conviction for immigration purposes goes beyond what New York State considers a conviction

The federal immigration definition of what constitutes a conviction for immigration purposes includes not only formal judgments of guilt, but also deferred adjudications where there is a plea or other admission of guilt plus some penalty or restraint ordered by the court. See INA Section 101(a)(48)(A), 8 U.S.C. 1101(a)(48)(A). As interpreted by the Board of Immigration Appeals (BIA), this definition may include an initial guilty plea even if the plea is later vacated. See Matter of Roldan-Santoyo, 22 I&N Dec. 512 (BIA 1999). In this precedent decision binding on immigration judges nationwide, the Board found that a noncitizen whose guilty plea to the offense of possession of a controlled substance was vacated and his case dismissed upon successful termination of his probation under the criminal laws of the State of Idaho, could be deemed convicted for immigration purposes under the immigration statutory definition of conviction. The Board stated: "We find that the language of the statutory definition and

its legislative history provide clear direction that this Board and the federal courts are not to look to the various state rehabilitative statutes to determine whether a conviction exists for immigration purposes . . . We therefore interpret the new definition to provide that an alien is considered convicted for immigration purposes upon the initial satisfaction of the requirements of section 101(a)(48)(A) of the Act, and that he remains convicted notwithstanding a subsequent state action purporting to erase all evidence of the original determination of guilt through a rehabilitative procedure." Thus, this definition may include New York dispositions involving alternative sentences to incarceration where an individual agrees to plead guilty and enters into drug, domestic violence or other counseling programs with the promise of later vacatur of the guilty plea if the individual successfully completes the program.

Current enforcement policies

At the same time as Congress has been making the immigration consequences of criminal dispositions ever harsher, the federal government has been devoting greatly increased resources to enforcement of these consequences, including increased staffing as well as improved access to criminal record databases at the Department of Homeland Security (DHS) (formerly the Immigration and Naturalization Service). In addition, the federal government has been actively seeking increased cooperation of local law enforcement agencies in the effort to identify removable noncitizens who are potentially removable on criminal grounds. In many cases, the DHS is serving detainers and obtaining removal orders against such noncitizens while they are in criminal custody. In other cases, the DHS is identifying noncitizens after they innocently travel abroad, or apply for U.S. citizenship or to replace a lost green card, and a criminal record check is done. In other cases, the DHS is placing noncitizens in removal proceedings after innocent contact with, and identification to the DHS by, a local law enforcement officer, such as a probation or parole officer or police officer making a traffic or other stop.

As a result of the harsher immigration laws, the increased allocation of resources to enforcement efforts, and increased cooperation of local law enforcement, the DHS is detaining and removing more and more noncitizens each year. In fact, DHS statistics show a dramatically increasing rate of removals based on criminal grounds over the past twenty years:

1983	863
1988	5,474
1993	22,470
1998	35,946
2003	39,600

See Yearbook of Immigration Statistics (2003) at http:/www.ice.gov/graphics/index.htm.

II. Important Issues for New York Judges, Lawyers, and Law Clinics to Consider

Fairness and justice issues raised by the immigration consequences of criminal convictions

New York's immigrant residents must suffer consequences of criminal case dispositions above and beyond those suffered by citizens residing in the state. These include not only the potential additional federal penalties of detention and deportation after release from the custody or control of the New York criminal justice system, but also less ability while under New York's criminal justice system custody or control to be free on bail pending trial, to benefit from sentencing alternatives to incarceration, and to obtain early release from incarceration. These consequences raise several fairness and justice issues regarding how immigrants are treated in New York's criminal justice system.

1. Noncitizens in New York State must not only suffer penalties under the immigration laws on top of those they suffer under the criminal laws, but they also suffer different treatment from citizens under the criminal laws themselves

As described above, federal immigration law provides for the detention and deportation of immigrants convicted of several categories of crimes. In general, however, a noncitizen must serve his or her criminal sentence before s/he is detained and deported by federal immigration authorities. See INA Section 241(a)(4)(A), 8 U.S.C. 1231(a)(4)(A). Therefore, it should be understood that the immigration consequences of detention and deportation are penalties that a noncitizen must suffer on top of those suffered by a U.S. citizen convicted of the same crime.

Not only do noncitizens suffer these penalties under the immigration laws that citizens need not suffer, but they also suffer greater penalties under the criminal laws and procedures themselves due to their noncitizen status. For example, noncitizens often are not granted release on bail pending the outcome of their criminal case at least in part because of their noncitizen status. See, e.g., United States v. Delgado-Rodriguez, 840 F. Supp. 191 (N.D.N.Y. 1993). Or they may be granted release on bail only to wind up in immigration detention when federal immigration authorities have lodged a detainer. Or their criminal defense lawyers may not even seek release on bail because they know or suspect that there is an immigration detainer in place.

In addition, once convicted and sentenced, a noncitizen defendant may be deemed ineligible for New York programs such as Shock incarceration, work release, or other programs that may offer ways of cutting incarceration time. The only route to early release from prison for a noncitizen may be what is called the Conditional Release for Deportation Only (CPDO) program, but only certain noncitizens, under limited circumstances, qualify for early release. In addition, in order to qualify, the individual must give up any right to fight his or her detention and deportation by federal immigration authorities. Moreover, there is no legal right to early release under the CPDO program even if the individual does qualify.

2. Noncitizens who plead guilty in New York State often do not know or fully understand the immigration consequences of their plea

The case of Cornelius Johnson described at the beginning of this paper illustrates the common circumstance of a noncitizen defendant in New York State making a choice during criminal proceedings, such as pleading guilty to a particular charge, without knowing or fully understanding the potentially devastating immigration consequences of the choice. Unfortunately, New York's legislature and courts have not exercised leadership in this area and have lagged behind the legislatures and courts of other states in rectifying this problem.

Among the five highest immigrant population states, New York State has the weakest statute providing for judicial warning of the immigration consequences of a guilty plea, and even this weak statute is slated to "sunset" this year. The New York court advisement provision -- enacted in the Sentencing Reform Act of 1995 before the 1996 laws made detention and deportation mandatory after conviction of many crimes -- requires New York criminal trial courts to advise defendants of the possibility of deportation, exclusion, or denial of naturalization, prior to accepting a defendant's plea of guilty to a felony. See NYCPL 220.50(7). One major deficiency of this statutory provision is that it does not extend to pleas of guilty to misdemeanor or violation offenses that may also have serious negative immigration consequences. Another deficiency is that the warning is not given until the plea allocution, which may be too late to give the noncitizen a real opportunity to reconsider his or her agreement to plead guilty. In addition, even if a trial court judge fails to make the advisement, the statute provides that this does not affect the voluntariness of the guilty plea so as to provide a basis for later withdrawal or vacatur of the plea. Finally, while other states, including most recently the states of Arizona and Massachusetts, are adding or strengthening judicial warning provisions since 1996, New York State is about to go in the other direction as the weak advisal provision currently on the books in New York is scheduled to "sunset" later this year.

New York State also lags behind in the extent to which its courts have provided a legal remedy for failure of defense counsel to advise a noncitizen defendant regarding the potential immigration consequences of a guilty plea. The New York State Court of Appeals held in 1995 – also notably before the 1996 laws made detention and deportation mandatory after conviction of many crimes -- that the failure to advise a defendant of the "possibility of deportation" following upon a guilty plea does not constitute ineffective assistance of counsel warranting vacatur of the plea. See People v. Ford, 86 N.Y.2d 397 (1995).

While the New York State Court of Appeals has left open the possibility that, under certain circumstances, affirmative misstatements regarding immigration consequences by defense counsel would constitute ineffective assistance to warrant vacatur of a plea, see People v. McDonald, 1 N.Y.3d 109 (2003), it has not responded to the post-1996 trend in legal professional standards and in Supreme Court and other court jurisprudence of recognizing a higher standard of what constitutes effective assistance of counsel on the immigration consequences of a guilty plea given the now broader reach and more certain nature of these consequences. For example, in 1999, the ABA revised its Standards for Criminal Justice, Pleas of Guilty, to include a new standard that specifically states that defense counsel "should determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences

that might ensue from entry of the contemplated plea." ABA Standards for Criminal Justice, Pleas of Guilty, Standard 14-3.2 (f) (3d ed. 1999). The commentary to this new ABA standard makes it clear that deportation is one of the most important of such consequences:

> [I]t may well be that many clients' greatest potential difficulty, and greatest priority, will be the immigration consequences of conviction. To reflect this reality, counsel should be familiar with the basic immigration consequences that flow from different types of guilty pleas, and should keep this in mind in investigating law and fact and advising the client.

See id. commentary to ABA Pleas of Guilty, Standard 14-3.2(f). The ABA's commentary notes that defense counsel "should be active, rather than passive, taking the initiative to learn about rules in this area rather than waiting for questions from the defendant." See id.

Likewise, the Supreme Court and some other federal and state courts have recognized that the more certain quality now of deportation as a consequence of conviction may call for a higher standard for effective assistance of counsel. See, e.g., *Immigration and Naturalization Service v. St. Cyr*, 533 U.S. 289, 322-323 n. 48 & n. 50 (2001) (citing ABA Standards with approval, and noting that "competent defense counsel" would include careful advice not only regarding deportability but also regarding whether a possibility existed of relief from deportation); *United States v. Couto,* 311 F.2d 179, 188 (2d Cir. 2002) (while holding that an *affirmative* misrepresentation by counsel as to the deportation consequences of a guilty plea is today objectively unreasonable, also suggested the possibility that standards of attorney competence have evolved to the point that, even without any affirmative misrepresentation, a *failure* to inform a defendant of the deportation consequences of a plea would by itself now be objectively unreasonable); *Williams v. State*, 641 N.E.2d 44 (Ind. App. 1994) ("attorney's duties to a client are [not] limited by a bright line between the direct consequences of a guilty plea and those consequences considered collateral").

3. Immigration consequences are often unintended by New York judges or prosecutors or even victims, and, in some cases, are contrary to express rehabilitative goals of the New York criminal justice system

It is readily apparent that, in many cases where the immigration sanctions are clearly disproportionate to the criminal penalties, the actors in the criminal justice system could not have intended the harsh immigration result, particularly in misdemeanor and lower level felony cases that resulted in little or no jail time. For example, could the judicial system and the prosecution have intended and deemed it in the public interest for permanent deportation to be the final outcome of the criminal proceedings in the following cases?:

> *Maria Wigent is a 37-year-old immigrant from Italy who has lived in Rochester, New York since she was five years old, and has a U.S. citizen husband and two children. She pled guilty to petit larceny charges for stealing a stick of deodorant, some eye drops, and*

three packs of cigarettes. She is now facing deportation. (Albany Times Union, October 31, 1999.)

Deon Spencer is a 33-year-old immigrant from Jamaica who works and cares for a daughter and sickly mother here. He got caught in a police drug sweep as he took a break from his postal job. He said that although he was innocent, a public defender encouraged him to plead guilty to a misdemeanor drug charge. He was sentenced to probation only. He has been ordered deported. (New York Daily News, November 18, 1999.)

Ana Flores is a young, lawful permanent resident immigrant from Guatemala who lives in a Virginia suburb of Washington, D.C. with her two U.S. citizen daughters, ages 9 and 8. Over several years, she complained to the police that her husband was assaulting her. Then, in June 1998, during one of their disputes, her husband sat on and hit her. She bit him and he called the police. The police arrested her and charged her with domestic assault. After a ten-minute hearing, the judge urged her to plead guilty. She did and was sentenced to six months probation, and thirty days in jail to be suspended if she finished the probation. She successfully completed the probation but is now in deportation proceedings. (New York Times, December 14, 1999.)

In some cases, even the alleged victim of a crime may not desire and will be negatively impacted by the detention and deportation of a noncitizen defendant. For example, a victim of domestic violence with children may not want the children's other parent to be permanently deported and may need to continue receiving the child support that a domestic violence defendant has been ordered to provide.

Finally, many in New York's criminal justice community are completely unaware of the detention and deportation risk faced by noncitizens who are offered alternative sentences to incarceration if they agree to plead guilty and enter into drug, domestic violence or other counseling programs with the promise of later vacatur of the guilty plea if the individual successfully completes the program. Under the federal immigration definition of what constitutes a conviction for immigration purposes, the initial guilty plea will suffice even if the plea is later vacated. See Matter of Roldan-Santoyo, 22 I&N Dec. 512 (BIA 1999) and discussion in "Overview of current law," subsection 5, in Section 1 above.

4. Immigration consequences exacerbate racial and ethnic disparities in the New York criminal justice system

There is little doubt that many criminal law enforcement policies and practices, e.g., drug sweeps, zero tolerance policies, racial profiling, enhanced federal sentencing for crack cases, have resulted in disparate treatment of individuals of certain racial and ethnic backgrounds. What is less well focused upon is how these disparities naturally carry over into who gets detained and deported by immigration authorities. The case of Deon Spencer described in subsection 2 above is an illustration of law enforcement

practices and criminal justice system pressures that particularly impact certain racial or ethnic communities and then affect who gets targeted or identified for enforcement of the immigration laws.

The immigration consequences of criminal convictions as a barrier to successful re-entry

For immigrants who are immediately detained and deported after release from criminal custody, the immigration consequences of a criminal conviction are not a traditional re-entry issue in the sense of posing an obstacle to successful re-entry into U.S. society upon release. In many cases, however, immigrants do return to U.S. society after a criminal case and any sentence have been completed either because the individual is not immediately identified for detention and removal (e.g., as might occur in a misdemeanor or low level felony case that does not result in custody time and immediate identification by the federal immigration authorities), or because the individual has been released pending a removal hearing. Moreover, in many such cases, an individual may have legitimate legal arguments to avoid detention and eventual deportation. Nevertheless, the risk of immigration consequences looms as a dark cloud over the individual's efforts at successful re-entry and re-integration into the community while such individual awaits a hearing and vindication of his or her legal rights.

1. Potential immigration consequences may operate as bars or disincentives to participation in New York criminal justice system rehabilitative procedures or programs

Noncitizens may not enjoy the full benefits of rights and benefits offered the criminally accused and convicted in New York State in order to allow or facilitate successful re-entry into society after the criminal case is over. As previously mentioned, noncitizens sometimes are not granted release on bail pending the outcome of their criminal case because of their noncitizen status. Or they may be granted release on bail only to wind up in immigration detention when federal immigration authorities have lodged a detainer. Or their criminal defense lawyers may not even seek release on bail because they know or suspect that there is an immigration detainer in place.

Noncitizens may not be considered for commitment to drug or domestic violence counseling programs as sentencing alternatives to incarceration because, understanding the immigration implications of a guilty plea to certain offenses, they may refuse to plead guilty even when they will not be considered for the alternative-to-incarceration sentence unless they do so.

In addition, once convicted and sentenced, a noncitizen may be deemed ineligible under New York law for programs such as Shock incarceration, work release, or other programs that may offer ways of cutting incarceration time and permit and encourage earlier and successful re-entry into society. Also, the increasing collaboration of New York probation and parole officers with immigration enforcement authorities may discourage some noncitizens from full compliance with probation or parole requirements.

2. Potential immigration consequences may also operate as disincentives for a New York immigrant to seek the immigration status or proof of such status required to secure employment, schooling, or government benefits that may be needed to re-integrate into society successfully after release from criminal custody and control

For those New York noncitizens not immediately detained or released from detention by immigration authorities following completion of a criminal case/sentence, potential immigration consequences may preclude lack of access to work, schooling, or government benefits needed to successfully re-integrate into society. This is because the threat of immigration detention and/or deportation looming over an individual immigrant due to a past encounter with New York's criminal justice system may run deter the individual from applying for citizenship, applying for new lawful admission status, or merely applying for proof of continuing legal status. Unfortunately, lawful status, or proof of such status, is generally necessary in order to obtain lawful employment, to receive college loans, or to qualify for many other government benefits needed to be able to support oneself and one's family after release from criminal custody. Thus, fear of running the risk of detention and removal may prevent a noncitizen's successful re-integration into family, community, and society.

3. If detained and/or placed in removal proceedings, a New York immigrant may be unable to access legal counsel or information in order to vindicate his or her legal rights in these proceedings

New York immigrants who are identified as removable based on criminal dispositions are often placed in detention and/or removal proceedings in places or under circumstances that make it virtually impossible to obtain legal counsel or information needed to fight detention and deportation. Many New York immigrants convicted of crimes have their removal hearings in upstate prisons while they are still serving their criminal sentences and where there are few, if any, free or low-cost legal services providers. Other New York immigrants who the government charges and detains as being removable based on past criminal dispositions are shipped to immigration detention or contract facilities in other states -- sometimes in rural communities in states as far away as Louisiana or Alabama -- where there is also little, if any, access to free or low-cost legal service providers. In addition, even for those immigrants who might have sufficient knowledge of English and education to represent themselves, there is often little or no access to up-to-date legal research resources in these facilities.

4. Detention and deportation generally result in permanent separation from family, community, and society in the United States

If a noncitizen is ordered removed from the United States, the reality in many, if not most, cases is that s/he will never be able to return lawfully to the United States. First, in the case of an individual removed on the basis of virtually any drug offense, such drug offense will most likely have the effect of making the client permanently inadmissible. An individual who is removed on the basis of conviction of an aggravated

felony is also made permanently inadmissible under a separate inadmissibility ground. See INA Section 212(a)(9)(A), 8 U.S.C. 1182(a)(9)(A). Finally, even if the individual does not fall within the drug-related grounds of inadmissibility, or is not removed on the basis of an aggravated felony conviction, s/he may be barred from future admission after removal for 5 years (in the case of a first removal based on inadmissibility), 10 years (in the case of a first removal based on deportability), or 20 years (in the case of a second or subsequent removal). See id. Even once the period of 5, 10, or 20 years has passed, the individual should not be under the impression that s/he will be able automatically to return. Although the bar on admission based on the prior removal will no longer be present, s/he will still have to establish eligibility otherwise for an immigrant visa, which may very well not be a possibility.

If the individual attempts illegal reentry after being removed, s/he will be subject to federal prosecution under federal immigration criminal laws providing now for lengthy federal prison sentences. These laws now provide for a sentence of up to 20 years if the individual had been removed subsequent to conviction of an aggravated felony; up to 10 years if the individual had been removed subsequent to conviction of any felony other than an aggravated felony, or three or more misdemeanors involving drugs or crimes against the person; and up to 2 years in other cases. See INA Section 276, 8 U.S.C. 1326. In recent years, U.S. Attorney's offices have dramatically stepped up enforcement of these criminal provisions.

Thus, removal based on criminal deportability or inadmissibility will most likely mean that a noncitizen convicted of an offense triggering deportability or inadmissibility will be permanently separated from home, family, employment, and other ties here in the United States. In those cases of an individual who might suffer political or other persecution in his or her country of nationality, removal could also mean that s/he may suffer even greater hardships, including loss of life.

III. Some Potential Remedies

1. Education of defense lawyers, judges, prosecutors, law students, and immigrants themselves on the immigration consequences of guilty pleas and convictions—For example, judges hearing criminal cases could be required or strongly encouraged to attend CLE programs on judicial responsibilities with regard to immigration and other collateral consequences of criminal convictions
2. Requiring by legislation or judicial standard that judges provide a meaningful warning early in any New York criminal proceeding, not only cases involving felony charges, regarding the potential immigration consequences of a guilty plea and conviction, with a requirement that a plea be vacated upon request if such warning was not given
3. More holistic representation by defense lawyers of immigrants in the criminal justice system, including defense lawyer counseling regarding immigration consequences of choices such as whether to plead guilty and continued defense lawyer representation, where possible, in any subsequent immigration

proceedings based on the criminal case (with such holistic representation modeled by law school clinical programs?)

4. More willingness by judges and prosecutors to agree to alternate dispositions or sentences in criminal cases involving noncitizen defendants in order to avoid unduly harsher penalties, considering the immigration consequences, suffered by a noncitizen compared to those suffered by a citizen convicted of the same crime – There should be such willingness particularly in any criminal case where penalties such as detention and deportation are determined by the court or the prosecutor to be unjust, disproportionate to the gravity of the offense, contrary to the interests of the victim, or otherwise contrary to the public interest
5. Restructuring of New York criminal case dispositions involving commitments of noncitizen defendants to drug or domestic violence counseling programs as alternatives to incarceration sentences in order to avoid immigration penalties that undermine the rehabilitative goals of these programs – For example, New York State drug court or drug or domestic violence counseling diversion procedures could be set up that do not involve an up-front guilty plea or a court-ordered sentence so that the state's rehabilitative purpose is not undermined by a disposition that would be deemed a conviction for immigration purposes
6. New York judicial and bar association and law clinic facilitation or encouragement of efforts to provide free or low-cost representation, counseling, or legal information to noncitizen defendants after the criminal case is over – For example, bar associations could establish pro bono programs to provide legal representation or counseling to noncitizens whose removal proceedings are held in prisons or detention facilities where they have little, or no, access to free or low-cost legal services providers
7. New York judicial and bar association and law clinic support for efforts seeking reform of the federal immigration laws to prevent unjust and disproportionate penalties for noncitizens who plead guilty or are convicted in the state's criminal justice system – For example, law clinics could help document cases involving unjust and disproportionate immigration consequences