PROVING PREJUDICE AFTER *LEE V. UNITED STATES*: INEFFECTIVE ASSISTANCE OF COUNSEL IN THE CRIMMIGRATION CONTEXT

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ABSTRACT

Ineffective assistance of counsel (IAC) claims are often the only means for noncitizens to challenge criminal convictions that make them deportable under immigration law. As a result, this doctrine of criminal procedure is a critical tool for noncitizens facing removal proceedings in immigration court. But even when a noncitizen can show that her attorney never informed her that a plea might make her deportable, she must still prove that this poor advice prejudiced her. Specifically, under the Supreme Court's decision in Lee v. United States*, she must show that if she had known she could be deported because of her plea, she would have opted instead to go to trial. This prejudice inquiry requires courts to ask confounding counterfactual questions about human decision-making.*

This Article argues that Lee *and the lower courts relying on* Lee *make two errors when they confront the prejudice inquiry in IAC cases involving noncitizens who unknowingly pleaded guilty to deportable offenses. First, they rely on limited and outdated theories of decision-making that do not reflect the realities of how noncitizen defendants choose between a plea deal or proceeding to trial. Second, because courts rely on limited theories of decision-making, they then use unreliable evidence of decision-making, excluding critical information about both the individual defendant making the decision to plead guilty (or not) and the criminal and immigration systems that influence such a decision.*

In response to these problems, this Article proposes two solutions. First, where a defendant's lawyer failed to inform her about the deportation consequences of a plea, and she does indeed face deportation, courts should presume IAC prejudice. This presumption is a modest reform that would be a step towards correcting the unjust results in these cases. Second, regardless of whether courts adopt such a presumption, they must expand their understanding of how and why people make plea decisions. This Article suggests several ways to broaden the universe of evidence in IAC cases involving deportation.

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Table of Contents

Introduction

In 2016, in a courtroom in Indiana, a nineteen-year-old named Angelo Bobadilla pleaded guilty to two misdemeanors.[1] Bobadilla, a Deferred Action for Childhood Arrivals (DACA) recipient, had been arrested after admitting to stealing a pack of underwear and a pack of t-shirts from a local Walmart "because he needed them."[2] When an officer searched him, they also found a small plastic bag of marijuana, a marijuana pipe, and one Vicodin tablet.[3]

Bobadilla's attorney negotiated a plea deal under which Bobadilla would plead guilty to two of four misdemeanor charges, including misde-

[1] Bobadilla v. State, 117 N.E.3d 1272, 1276 (Ind. 2019).
[2] *Id.* at 1276.
[3] *Id.* at 1276–77.

meanor theft and misdemeanor marijuana possession, and would receive a suspended sentence.[4] At his plea hearing, Bobadilla's attorney failed to inquire about his immigration status and noted on a court form that the usual advisement regarding immigration consequences was not necessary.[5] Like most guilty-plea hearings, this one "went as expected—quickly and routinely. At the end, the court wished Bobadilla good luck, Bobadilla thanked the judge, and he left the courthouse."[6]

But that routine plea hearing irrevocably changed Bobadilla's life. Bobadilla soon learned that his guilty plea made him deportable, and he promptly filed a petition for post-conviction relief based on ineffective assistance of counsel (IAC).[7] At a hearing on the petition, Bobadilla's attorney admitted to not inquiring about his client's immigration status because "he simply assumed Bobadilla was a United States citizen and did not understand that 'Bobadilla' was a Hispanic name."[8] Bobadilla argued that he relied on the advice of his attorney in filling out the court form and that he would have "taken a different approach" had he known the consequences.[9] The court denied his petition.[10] Bobadilla was transferred from the county jail into Immigration and Customs Enforcement (ICE) custody.[11] He filed an emergency motion with the post-conviction court, which was again denied.[12]

Bobadilla's appellate counsel filed an appeal to the Indiana Court of Appeals, which affirmed the lower court's decision.[13] Counsel then appealed it to the Supreme Court of Indiana.[14] The court held that 1) the action to mark "N/A" on the court form next to the standard advisement on immigration consequences without inquiring into Bobadilla's immigration status constituted deficient performance, and 2) this deficient performance prejudiced Bobadilla. Bobadilla was a teenager and a first-time offender at the time of his arrest.[15] He had been employed and had received DACA.[16] He had lived in the United States since he was a young child.[17] Given these facts and the likelihood of securing a sentence of less than 365 days even if convicted at trial, "it appears reasonable that [Bobadilla] would've taken a chance at trial rather than enter a plea agreement that ensures deportation."[18] With that, the Supreme Court of Indiana vacated the court of appeals decision. But the recognition of the lower courts' errors came two years too late: by then,

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[4] *Id.* at 1277.
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.* at 1278.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.* at 1279.
[13] *Id.*
[14] *Id.*
[15] *Id.* at 1284, 1288.
[16] *Id.* at 1288.
[17] *Id.*
[18] *Id.*

Bobadilla was already deported, "and the record is silent on his current whereabouts."[19]

Bobadilla illustrates how high the stakes are for noncitizen defendants who receive ineffective assistance of counsel. In criminal courtrooms across the country, noncitizens like Bobadilla are in a uniquely vulnerable position while pleading guilty because they often make these decisions without critical information about potential immigration consequences. Although defense counsel have had a constitutional duty to inform defendants of potential deportation since the Supreme Court's 2010 ruling in *Padilla v. Kentucky*, there remained, following *Padilla*, a question about whether the failure to give such advice prejudiced the defendant under the doctrine of ineffective assistance of counsel.

In 2017, in *Lee v. United States*, the Supreme Court answered the question of when a lawyer's incorrect advice on immigration matters prejudiced a defendant, by asking whether the defendant would still have accepted the guilty plea if he had been correctly advised on the immigration consequences. *Lee* also provided guidance to lower courts on how to assess prejudice by outlining a series of factors for courts to consider as part of the inquiry.

But the *Lee* factors can lead to conflicting and often perverse results. Courts struggle to make sense of a counterfactual hypothetical inquiry about how a noncitizen defendant would have chosen between a plea bargain and a trial had she received correct information about the consequences of each. In many ways, *Lee* and its progeny represent broader problems with an IAC jurisprudence that leads to confusing and unfair results and procedures.[20] *Lee* also represents the problematic way that courts approach two separate issues: the experiences of noncitizens in the criminal system and the realities of modern plea bargaining. This Article identifies these blind spots and then proposes reforms to the IAC jurisprudence to correct them.

For decades, plea bargaining practice received relatively little attention from the Supreme Court as a matter of constitutional criminal procedure. Since 2010, however, the Court has turned to plea bargaining with more frequency, focusing particularly on IAC in the plea arena. The IAC analysis involves a two-prong test.[21] The first—the performance prong—requires courts to determine whether a defense counsel's performance of her duties fell below reasonable norms of professional conduct.[22] In the plea context, this prong has remained largely the same. However, the second part of the

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[19] *Id.* at 1279.

[20] *See* Justin Murray, *Prejudice-Based Rights in Criminal Procedure*, 168 U. PA. L. REV. 277 (2020) (noting ways in which prejudice prong of ineffective assistance of counsel inquiry leads to unfair outcomes and procedures).

[21] Strickland v. Washington, 466 U.S. 668, 688–94 (1984) (holding that defendant must show both that defense counsel's performance fell below an objective standard of reasonableness ("performance prong") and also that such performance prejudiced defendant ("prejudice prong")).

[22] *Id.* at 687.

inquiry—the prejudice prong—has developed significantly since the Court took up plea bargaining.

In recent cases, the prejudice prong of the IAC analysis shifted from inquiring about the decision-making of the factfinder to the decision-making of the defendant. The prejudice prong requires lawyers and courts to perform a confounding counterfactual inquiry: if the lawyer had performed competently, is there a reasonable probability that the outcome would have been different? And in the plea context, the question is equally impenetrable: if the lawyer had performed competently, and therefore, the defendant had understood the consequences of accepting the plea, would she still have pleaded guilty to the crime? Or would she instead have insisted on a trial?

This Article examines the prejudice inquiry through the lens of the decision-making of noncitizen defendants, who often face a terrible choice at plea bargaining: to either accept a plea offer with a shortened sentence and near-certain deportation or take their chances at trial. Trial, though, comes with the risk of a longer sentence than was offered in the plea, but it may provide an opportunity to escape deportation through an acquittal. So, how does a noncitizen defendant decide when confronted with this choice?

The Supreme Court attempted to answer this question in *Lee,* which seemingly resolved a circuit split over the question of how noncitizens weigh their options at plea bargaining.[23] The *Lee* case created a totality-of-the-circumstances test that relied on several non-exclusive factors laid out by the Court. Those factors rely heavily on two buckets of inquiry. The first is whether the defendant gave a full-throated expression of her desire to avoid deportation at all costs *at the time of* the plea negotiations. The second examines the choices the defendant faced when she made the decision to plea, and it pits the potential sentence after trial against the deportation risks and plea offer on the table. This second bucket relies on a "shadow of trial" theory, a model of decision-making that posits that defendants make decisions based on their perceived outcomes after trial. Using these two buckets, the court assesses whether the defendant would have made a different choice at the time of the plea if she had been correctly advised about the deportation consequences of her conviction.

Lee was a major development in criminal procedure and should be viewed as a defining case for the rights of noncitizens in immigration proceedings. Indeed, IAC is a critical avenue of deportation relief for noncitizens who find themselves in removal proceedings because of a criminal conviction.[24] In this way, *Lee*, like *Padilla* before it, is a profoundly important case in immigration law. If a noncitizen can show that her attorney was ineffective in the criminal system, she may avoid a terrible fate in the immigration system. Where avenues of discretionary relief from deportation are

[23] Lee v. United States, 137 S. Ct. 1958 (2017).

[24] As Stephen Lee notes, state criminal courts have essentially become de facto immigration courts because of their role in later immigration proceedings. Stephen Lee, *De Facto Immigration Courts*, 101 Calif. L. Rev. 553, 555 (2013).

increasingly limited following conviction, the constitutional right to effective assistance of counsel in criminal proceedings becomes even more crucial. A defendant's ability to demonstrate the deprivation of this critical right may be her only hope of remaining in this country.

Lee is the ultimate example of crimmigration law—the intersection of immigration and criminal law.[25] Although *Lee* and its progeny treat the two systems as separate entities, they make clear the entanglement between the procedures and consequences of the criminal and immigration systems. As these cases show, courts often struggle with how to analyze the impact of one system within the other, and this struggle is particularly acute in the prejudice analysis of IAC cases involving noncitizens.

Given these realities, this Article argues that the current IAC regime in cases involving noncitizens who entered into misinformed plea bargains is problematic for two reasons.[26] First, the IAC jurisprudence in this area relies on incomplete theories of *how* people make decisions. Courts tend to rely on the "shadow of trial" model, focusing on how the defendant weighed the hypothetical outcome after trial against the plea on the table. This focus leads them to analyze, in the counterfactual, if it would have been rational for the defendant to reject the plea on the table in favor of going to trial. As social science literature reveals, evaluating the rationality of an individual's decision is almost impossible without a deep understanding of the individual's characteristics and background. Because courts tend to exclude a defendant's unique background in making IAC decisions, this focus on rationality is of particular concern.

Second, this Article argues that in IAC cases involving noncitizens pleading guilty, courts fail to account for the lived experiences of noncitizen defendants in criminal and immigration courts in several key regards. Because courts rely on the "shadow of trial" model, they often weigh the sen-

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[25] This Article will address crimmigration from the perspective of defendants who may face deportation proceedings as a result of their criminal conviction, rather than through the lens of status crimes, like illegal reentry, which criminalize the act of returning to the United States after deportation. The elements of illegal reentry are that the defendant 1) is an "alien," 2) is denied admission, excluded, deported, or removed from the U.S., and 3) thereafter enters, attempts to enter, or is at any time found in the U.S. without permission. 8 U.S.C. § 1326. Because these elements are relatively easy for the state to prove, these cases rarely go to trial. It is critical to note that illegal reentry accounts for well over half of the case load in some federal prosecutors' offices, demonstrating just how much crimmigration is part of the regular functioning of the criminal system. *See Table D-3—U.S. District Courts–Criminal Federal Judicial Caseload Statistics*, U.S. Courts (Mar. 31, 2020), https://www.uscourts.gov/statistics/table/d-3/federal-judicial-caseload-statistics/2020/03/31, *archived at* https://perma.cc/U2JM-XBK6.

[26] We are not the first to critique the prejudice prong of the ineffective assistance of counsel doctrine. There is robust literature about the deep flaws with the prejudice analysis, which we draw from here. *See, e.g.*, Murray, *supra* note 20 (arguing that the current prejudice inquiry leads to unfair outcomes for defendants and should be reformed); Lisa Kern Griffin, *Criminal Adjudication, Error Correction, and Hindsight Blind Spots*, 73 Wash. & Lee L. Rev. 165, 189 (2016) (noting how "hindsight blindness" poses a serious hurdle to the fair resolution of the prejudice inquiry). Other scholars have called for the prejudice prong to be eliminated entirely. *See infra* note 248.

tence after trial against the plea offer sentence as though they are both clear, binary decision points. In doing so, courts ignore the real-world lawyering that often avoids both deportation and huge sentences after trial. When courts do veer from the "shadow of trial" model, it is usually because the defendant made clear statements *at the time of the plea* about her desire to avoid deportation as the motivating factor in her plea decision-making. But this focus on contemporaneous statements ignores the ways in which defendants' voices are limited or even totally excised from the criminal court experience. Finally, the cases overlook the reality of how defendants experience the immigration system, particularly immigration detention, which is necessarily implicated in the deportation process and plays into a defendant's decision to proceed with her criminal case.

This Article proposes two avenues of reform to address the courts' reliance on problematic theories and evidence of decision-making. First, courts should largely stop trying to figure out the counterfactual claim, which is nearly impossible given all the moving pieces of human decision-making. Instead, where a defendant can make a prima facie case showing that 1) she received incorrect advice from her lawyer about deportation, 2) with correct advice, she would have made a different decision, and 3) she indeed faces deportation,[27] courts should presume prejudice, allowing the defendant to prevail on her IAC claim unless the state can rebut the presumption. This presumption acknowledges the dire nature of deportation, which, even as the Supreme Court recognized, some consider a much worse outcome than a lengthy prison sentence.[28] There is simply no other solution (under IAC, at least) to the injustice that follows in the immigration courts from a lawyer's failure to live up to her constitutional duty in the criminal courts. Second, regardless of whether courts adopt our suggested presumption, they must expand both the theories and evidence of decision-making they rely on. Right now, courts tend to see the list of *Lee* factors as the boundaries of their inquiry, rather than the starting point. We encourage courts to embrace more realistic theories of decision-making that will require better evidence of decision-making.

Part I of the Article discusses the Supreme Court's view of defendant decision-making and focuses on how *Padilla* and *Lee* lay out particular visions of how and why noncitizens make decisions at the plea stage. Part I also explores the unspoken theories of decision-making that prop up the *Lee* decision and the lower court decisions that follow *Lee*. It then outlines the evidence of decision-making that courts rely on in these IAC cases. The first section of Part II critiques those underlying theories, with a focus on the "shadow of trial" model, and how those theories have been seemingly imported into the IAC doctrine in this area. It then offers additional theories of decision-making that would more realistically reflect the way defendants

[27] As we discuss in greater detail in Part III, "facing deportation" does not necessarily mean that the defendant is imminently to be deported, but rather is at risk of deportation.

[28] Padilla v. Kentucky, 559 U.S. 356, 368 (2010).

make these critical decisions. Part II then turns to a critique of the evidence of decision-making that flows from the courts' adopted theories of decision-making. Finally, Part III offers a path forward for courts to develop a clearer and more just IAC doctrine that reflects the lived experience of noncitizen defendants.

I. Padilla, Lee, and the Courts' Views of Defendant Decision-Making

a. Ineffective Assistance of Counsel in the Plea Context

The IAC jurisprudence focuses on the nature of decision-making. The test for IAC involves two inquiries, typically called the performance prong and the prejudice prong.[29] The performance prong asks how the lawyer made a decision and whether that decision made sense in the context of the case. For instance, if a lawyer did not present evidence of the defendant's mental health history,[30] call any witnesses at the defendant's sentencing hearing,[31] or investigate the case[32]—were these sound decisions for that lawyer to make?[33] The Court also developed certain defense attorney "duties," which make the performance analysis more straightforward.[34] The performance prong then asks about the *lawyer's* decisions and whether those decisions met a particular standard as defined by law. If a lawyer's decision fails to rise to an objective standard of reasonableness, the defendant wins[35] on the performance prong.[36]

The prejudice prong, however, shifts the decision-making inquiry from the lawyer to another party. In the traditional, non-plea context, IAC asks whether there is a reasonable probability that the result would have been

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[29] Strickland v. Washington, 466 U.S. 668, 677 (1984).

[30] *Id.* at 675–76.

[31] *Id.*

[32] *Id.* at 689–91.

[33] To assess these circumstances, the Supreme Court directed lower courts to materials like the ABA's *Model Rules of Professional Conduct* or public defender training materials. Nix v. Whiteside, 475 U.S. 157, 165–172 (1986).

[34] For a review of certain actions that courts will find to be conclusively deficient performance, *see* Eve Brensike Primus, *Disaggregating Ineffective Assistance of Counsel Doctrine: Four Forms of Constitutional Ineffectiveness,* 72 Stan. L. Rev. 1581, 1630–35 (2020).

[35] *Strickland*, 466 U.S. at 681, 687–91 (holding that in ineffective assistance of counsel claims, defendant carries burden to prove both prongs). Ineffective assistance of counsel is often a post-conviction claim and defendants may not have a right to a lawyer. For this reason, many ineffective assistance of counsel claims are pro se.

[36] This is the common perception of how the performance prong works. But as Eve Brensike Primus notes, the performance inquiry is actually more complicated than this. As she writes, there are "three different tests . . . for assessing deficient performance in personal ineffectiveness cases. [S]ome kinds of attorney errors give rise to a conclusive presumption of deficient performance, others create a rebuttable presumption of deficient performance, and only those that remain are judged under *Strickland*'s highly deferential reasonableness analysis." Primus, *supra* note 34, at 1628.

different had the lawyer performed appropriately.[37] Still, to answer that question, the court must ask whether the fact-finder would have made a different decision. For instance, would the jury have found the defendant not guilty if the lawyer had not been drunk during the trial?[38] Would the judge have sentenced the defendant to a lower sentence if the lawyer had submitted mitigation evidence during the sentencing hearing?[39]

Ineffective assistance of counsel is not only doctrinally complicated; it is also procedurally complicated. It is a post-conviction claim that often starts with a pro se filing by the defendant.[40] The defendant often needs to have an attorney appointed to the case, who must then review the record of decision-making by all parties. That record is frequently poorly recorded if it is recorded at all.[41] Particularly in the case of a plea bargain, the formal record may only consist of a short colloquy.

Unlike the trial process, the plea system has few constitutional limits.[42] The plea system relies heavily on defense attorneys to assess whether the defendant is, as the Constitution requires, knowingly and voluntarily pleading guilty. Indeed, for the most part, courts may assume a defendant's constitutional waiver if represented by competent counsel.[43] Despite this presumption of competent counsel in the plea bargain context, the Court has, until recent memory, hesitated to say what exactly makes plea counsel competent. Performance continues to be measured against prevailing professional norms, or duties defined by the Supreme Court. In the plea context, though, the Court focuses on a defense attorney's advice rather than how they negotiated the plea.[44]

In *Padilla v. Kentucky*, the Court revived a conversation about IAC at plea bargaining that had been dormant for decades. In *Padilla*, the defendant's lawyer provided clearly wrong advice about whether his conviction would result in deportation. Once he pleaded guilty, the defendant realized that his conviction made him deportable. Although the Supreme Court previ-

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[37] *Strickland*, 466 U.S. at 691–96.

[38] Ken Armstrong, *What Can You Do with a Drunken Lawyer*, The Marshall Project (Dec. 10, 2014), https://www.themarshallproject.org/2014/12/10/what-can-you-do-with-a-drunken-lawyer, *archived at* https://perma.cc/X85U-RD7H.

[39] *Strickland*, 466 U.S. at 705 (discussing counsel's failure in death penalty case to present mitigating evidence of defendant's mental health issues or to follow up with defendant's family about his mental health).

[40] Nancy J. King et al., Final Technical Report: Habeas Litigation in U.S. District Courts 55 (2007).

[41] *See* Part II.b.ii. for a discussion of the lack of written record that accompanies most plea negotiations.

[42] *See generally* Brady v. United States, 397 U.S. 742 (1970) (holding defendant's plea must be made knowingly and voluntarily to meet constitutional standard).

[43] The Supreme Court held that courts may generally rely on the presumption that competent defense counsel will advise a client of the plea conviction's elements, which is required to secure a valid guilty plea. Henderson v. Morgan, 426 U.S. 637, 646–47 (1976). *See also* Marshall v. Longberger, 459 U.S. 422, 436–38 (1983) (relying on *Henderson* to find that defendant received description of nature of charges against him because he was represented by competent counsel).

[44] Padilla v. Kentucky, 559 U.S. 356, 366 (2010).

ously held that defense attorneys were not ineffective when they gave incorrect advice on collateral consequences,[45] the *Padilla* Court made the seismic concession that immigration consequences were not collateral but instead a special type of consequence straddling the line between collateral and direct.[46] From this premise, the Court held that the defense attorney must accurately advise the defendant of any "clear" deportation consequences of his conviction, creating a category of per se deficient performance.[47]

Even if the defendant overcomes the performance prong, she then faces the burdens of the prejudice prong, which—in the plea context—are many. In the 1985 case of *Hill v. Lockhart*, the Court first applied the IAC test to a plea bargain and found that for the defendant to satisfy the prejudice prong of the *Strickland* analysis,[48] "the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."[49] This test required evidence that the defendant would have made a different choice with different facts. The petitioner in *Hill* was not properly advised about his parole eligibility date, but the Court found that the incorrect advice did not prejudice him because "he alleged no special circumstances that might support the conclusion that he placed particular emphasis on his parole eligibility in deciding whether to plead guilty or not."[50]

The *Padilla* decision in 2010 left open the question of under which circumstances a lawyer's bad advice on immigration matters prejudiced a defendant. *Lee* returned to the prejudice question and found that *Hill* was the proper test to apply.[51] But *Lee* also provided guidance to lower courts in the form of several non-exclusive factors, which we discuss in detail below.

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[45] *Id.* at 365.
[46] *Id.* at 366–68.
[47] *Id.* at 368–69.
[48] Strickland v. Washington, 466 U.S. 668, 688–94 (1984).
[49] Hill v. Lockhart, 474 U.S. 52, 59 (1985).
[50] *Id.* at 60.
[51] It is worth noting also that in the companion cases of *Missouri v. Frye* and *Lafler v. Cooper*, the Court finally confronted the role of counsel at plea bargaining and made clear that the effectiveness of the defense attorney is assessed, at least in part, on the outcome for the defendant. In each case, the defendant claimed his conviction should have been invalidated because of counsel's incorrect advice. In *Frye*, the defendant sought to challenge a guilty plea that he accepted without having ever been told about a much more favorable prior offer. Missouri v. Frye, 566 U.S. 134, 138 (2012). In *Lafler*, the defendant made a slightly different argument and sought to invalidate a conviction post-trial on the grounds that the defendant rejected a pre-trial offer based on his lawyer's very bad advice. Lafler v. Cooper, 566 U.S. 156, 161–62 (2012). The test for prejudice laid out by the Supreme Court was the same in both cases and required a multi-fold analysis. The defendant must show a reasonable probability that 1) he would have accepted the initial plea, 2) that neither the prosecution nor the trial court would have prevented the offer from being accepted, and 3) that the outcome from the initial plea offer would have been favorable to him (i.e., a lower sentence, lower charge, or both). *Frye*, 566 U.S. at 147; *Lafler*, 566 U.S. at 163–64.

b. Lee at Work

Because the cases that come after *Lee* are so fact-dependent, it is worthwhile to review the facts of the case. Jae Lee had lived in the U.S. since he was thirteen years old.[52] After graduating high school, he moved from New York to Tennessee, where he opened one successful restaurant and then another.[53] Although a lawful permanent resident, Lee never became a U.S. citizen.[54] He also never returned to his home country of South Korea.[55] In 2008, a confidential informant claimed that Lee had sold him 200 ecstasy pills and two ounces of marijuana.[56] During a search of Lee's home, federal agents found eighty-eight ecstasy pills, three Valium tablets, a substantial amount of cash, and a gun.[57] Lee was indicted for possessing ecstasy with the intent to distribute.[58]

According to the Supreme Court, Lee had no real defense to the charges.[59] Lee's attorney advised him that a trial was "very risky" and that he could receive a reduced sentence through plea bargaining his case.[60] The Supreme Court did not discuss the amount of the reduction, and it is difficult to tell from the briefing just how much time Lee was facing after trial. (However, Lee likely faced anywhere between zero and 20 years.[61]) Lee negotiated a plea with a sentence of a year and a day in prison.[62] The start of the sentence was deferred for two months so Lee could continue managing his restaurants during the holidays.[63]

From the start of his criminal case, Lee expressed concern about what the drug charge would do to his immigration status.[64] Lee "informed his attorney of his noncitizen status and repeatedly asked him whether he would face deportation as a result of the criminal proceedings."[65] Lee's attorney told him that deportation would not be an issue because it was not included in the plea agreement, but as the Supreme Court put it, "Lee's attorney was wrong."[66] Indeed, Lee would be deported after serving his sentence because his criminal conviction qualified as an "aggravated felony"[67] under immi-

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[52] Lee v. United States, 137 S. Ct. 1958, 1962 (2017).
[53] *Id.* at 1962–63.
[54] *Id.* at 1963.
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.* at 1962.
[59] *Id.*
[60] *Id.* at 1963.
[61] *See infra* Part II.b.i.
[62] *Lee*, 137 S. Ct. at 1963.
[63] *Id.*
[64] *Id.* at 1962.
[65] *Id.* at 1963.
[66] *Id.* at 1962–63.
[67] The definition of an aggravated felony under immigration law can be found in 8 U.S.C.S. § 1101(a)(43) (2012). The term includes a large number of offenses that would not necessarily qualify as serious felonies under state or federal criminal law, including theft offenses (§ 1101(a)(43)(G)) and altering a passport (§ 1101(a)(43)(P)).

gration law.[68] When Lee discovered the inevitability of his deportation, he brought an IAC claim.[69] Clearly, Lee's attorney failed under *Padilla*'s performance prong because he gave Lee affirmatively incorrect advice.[70] But the second question remained: had this bad advice prejudiced Lee?

Padilla had not resolved the prejudice question—how should courts decide whether a defendant would have proceeded to trial if he understood the deportation consequences? This was the question at the heart of *Lee*. Although Lee explicitly said he did not want to be deported from the United States, there was overwhelming evidence of his guilt. Lee was unlikely to prevail at trial. Under those conditions, how could a "good" plea deal have prejudiced Lee?

Before *Lee*, several courts tackled the same issue, coming to different conclusions. This circuit court split on the issue reflected a debate among lower courts about how noncitizens decide whether to proceed to trial or accept a plea bargain that carries a lower sentence than the trial sentence and risks deportation from the country. That debate was premised on a series of empirically untested assumptions about how noncitizen defendants (and defendants more generally[71]) make decisions.

In the end, the Supreme Court resolved the question in favor of Lee, finding that he could have chosen to forgo a good plea deal even in the face of terrible trial prospects.[72] The *Lee* decision relied on the test established in *Hill*. Under this test, the appropriate inquiry for determining whether counsel's deficient performance has prejudiced a defendant is not whether the defendant "would have been better off going to trial," but instead whether there is a "reasonable probability that, but for counsel's error, he would not have pleaded guilty and would have insisted on going to trial."[73] According to *Hill*, when a defendant has been deprived of a judicial proceeding, the inquiry must not center on "how a hypothetical trial would have played out absent the error."[74] Instead, the inquiry must center on the defendant's decision-making process and the various factors that would have influenced the defendant had he been properly advised.

As the next section explains, *Lee*, like *Hill*, was premised on the "shadow of trial" theory of defendant decision-making, and the factors laid out by the *Lee* Court for determining what sort of decision a defendant would have made are responsive to this theory.

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[68] *Lee*, 137 S. Ct. at 1963.
[69] *Id.*
[70] *Id.* at 1964.
[71] Indeed, the *Lee* opinion notes that its decision is an extension of the Court's opinion in *Hill v. Lockhart*, 474 U.S. 52 (1985), which dealt with a citizen defendant. *Lee*, 137 S. Ct. at 1966 ("And, more fundamentally, the Government overlooks that the inquiry we prescribed in *Hill v. Lockhart* focuses on a defendant's decision-making, which may not turn solely on the likelihood of conviction after trial").
[72] *Lee*, 137 S. Ct. at 1958.
[73] *Id.* at 1965.
[74] *Id.*

i. Theories of Decision-Making

1. "Shadow of Trial" Model

To understand *Lee*, the way lower courts interpret it, and the problems that arise from such interpretations, this Article pulls apart two threads that run through both *Lee* and lower court decisions applying *Lee*. The first thread concerns the theories of decision-making that animate *Lee* and its progeny. Although specific theories are not mentioned in *Lee*, their presence—particularly the "shadow of trial" model of plea decision-making—are critical to understanding the logic of the test laid out by the Court. As this section explains, the "shadow of trial" model leads the *Lee* Court to adopt a rational inquiry test that has morphed into a reasonableness test for many lower courts, creating confusion over which decision-making theory should be applied.

The "shadow of the trial" model emerged in the early years of studying defendant decision-making and was imported from the civil context. Underlying this theory is the notion that defendants objectively weigh out the pros and cons of either accepting the plea deal or rejecting it in favor of going to trial. In that weighing of options, defendants evaluate their prospects at trial and the likely outcome, including the expected sentence upon conviction. Under the shadow model, defendants examine the plea offer in the context (i.e., in the shadow) of the trial. They compare the two and decide which confers more favorable results.[75]

The *Lee* Court incorporates the "shadow of trial" model's focus on the likelihood of conviction at trial and how defendants weigh the consequences of conviction at trial or conviction by plea. The Court explains that the *Hill* inquiry, which requires a case-by-case analysis, includes an examination of the defendant's probability of conviction. This focus on the probability of conviction is not because the likelihood of conviction determines whether an attorney's deficient performance prejudiced the defendant, but "because defendants obviously weigh their prospects at trial in deciding whether to ac-

[75] Lucian Dervan has written extensively about the "shadow of trial" theory and credits a 1992 article by Robert E. Scott and William J. Stuntz, titled *Plea-Bargaining as a Social Contract*, as laying out the underlying foundation of the theory as applied to plea bargaining: "In all criminal cases, therefore, the plea bargain represents a contract negotiated by both parties that largely reflects the likelihood of conviction at trial and the likely sentence resulting from such conviction." Lucian E. Dervan, *The Surprising Lessons from Plea Bargaining in the Shadow of Terror*, 27 Ga St. L. Rev. 239, 251–52 (2011). By contrast, Dervan has also identified another theory of plea bargaining that has emerged, what he calls the "administrative theory." This theory "portrays prosecutors as administrative figures handing down punishment in the place of the courts" and defendants as "passive players" who are "forced to accept the government's offer because they are powerless to influence the bargain and risk too much by proceeding to trial." *Id*. at 246–50. Because the decision in *Lee* operates under a presumption of the defendant having an active role in the plea bargain process, we have not included the administrative theory in our discussion. For a discussion of the administrative theory, *see generally id.*

cept a plea."[76] As the *Lee* Court noted, "[w]here a defendant has no plausible chance of an acquittal at trial, it is highly likely that he will accept a plea if the Government offers one."[77] Lee's chances of acquittal at trial were nearly non-existent. There was substantial evidence of his guilt, and he seemingly had no viable defense, but the Court's inquiry did not end there.

Next, the Court stated that "[t]he decision whether to plead guilty involves assessing the respective consequences of a conviction after trial and by plea."[78] In Lee's case, the consequences of pleading guilty were imprisonment for a year and a day, followed by certain deportation. The consequences of conviction at trial, on the other hand, were imprisonment for a few additional years (according to the Court—although as we note in Part II.b., this prediction is not certain), followed by certain deportation. However, the Court noted that when the consequences of conviction and the consequences of accepting a plea are—in the defendant's view—"similarly dire, even the smallest chance of success at trial may look attractive."[79] In the face of similarly dire consequences, the very slim prospect of acquittal at trial was sufficient to provide a sound basis for Lee to decide to go to trial had he been appropriately informed.

2. Rationality and Reasonableness

Born from this embrace of the "shadow of trial" model, the *Lee* Court and many lower courts applying *Lee* have focused on the rationality of the defendant's decision.[80] The "rational inquiry" forms a key component of the Court's evaluation of the prejudice prong in *Lee*. This inquiry has its foundation in *Padilla*, with the *Lee* Court noting that a defendant "must convince the court that a decision to reject the plea bargain would have been rational under the circumstances."[81] The purpose of this inquiry is to ensure that courts do "not upset a plea solely because of *post hoc* assertions of a defendant about how he would have pleaded but for his attorney's deficiencies."[82] A proper analysis includes an examination of the defendant's *post hoc* assertions of what he would have done with attention to the circumstances surrounding that decision. If those circumstances would have led a defendant to rationally reject the offer on the table, the *post hoc* assertions may be properly accepted.

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[76] Lee v. United States, 137 S. Ct. 1958, 1966 (2017).
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.* at 1968–69.
[81] *Id.* at 1968 (quoting Padilla v. Kentucky, 559 U.S. 356, 372 (2010)) (internal quotation marks omitted).
[82] *Id.* at 1967. Stated differently, the goal is "to prevent criminal defendants with bargainer's remorse from simply claiming that they would not have taken a deal but for a bit of bad advice." United States v. Murillo, 927 F.3d 808, 816 (4th Cir. 2019).

In *Lee*, this inquiry centers on the individual defendant and must be evaluated on a case-by-case basis.[83] The Court explains:

> We cannot agree that it would be irrational for a defendant in Lee's position to reject the plea offer in favor of trial. But for his attorney's incompetence, Lee would have known that accepting the plea agreement would *certainly* lead to deportation. Going to trial? *Almost* certainly. If deportation were the "determinative issue" for an individual in plea discussions, as it was for Lee; if that individual had strong connections to this country and no other, as did Lee, and if the consequences of taking a chance at trial were not markedly harsher than pleading, as in this case, that "almost" could make all the difference. Balanced against holding on to some chance of avoiding deportation was a year or two more of prison time. Not everyone in Lee's position would make the choice to reject the plea. But we cannot say it would be irrational to do so.[84]

What stands out from this paragraph is how the Court's use of a case-by-case analysis, the rational inquiry, and the "shadow of trial" model may conflict even within the same case. On the one hand, the Court describes the analysis as looking to what "would be irrational for a defendant in Lee's position," but on the other hand, the inquiry ends with an acknowledgment that "[n]ot everyone in Lee's position would make the choice" that Lee made, even if that choice was not inherently irrational.[85] Within this, there is a push and pull between an inquiry that asks what a "rational," seemingly objective, defendant would do under the circumstances and a subjective inquiry focused only on the decision-making of the individual defendant involved in the case. The Court attempts to place Lee's *post hoc* assertions of what he would have done within a range of acceptably rational decisions to determine if Lee would have proceeded to trial in this counterfactual.[86]

This push-and-pull likely stems from the Court's understanding that the "shadow of trial" model does not accurately capture this scenario. A straight application of the shadow model would lead to the conclusion that the rational decision is to accept the plea, knowing that the prospects of acquittal at trial are slim and the consequences of conviction after trial are greater. But, the Court acknowledges that considerations outside of just the prospects

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[83] *Lee*, 137 S. Ct. at 1966.

[84] *Id.* at 1968–69.

[85] *Id.*

[86] This conflict between objective and subjective reasonableness pervades every area of the law, including tort, contract, and criminal law, among others. Although we do not recite these debates here, we note that there is a rich literature on the role of rationality in these debates. For more, *see* Alena M. Allen, *The Emotional Woman*, 99 N.C. L. Rev. 1027, 1036–56 (2021); Michael Vitiello, *Defining the Reasonable Person in the Criminal Law: Fighting the Lernaean Hydra*, 14 Lewis & Clark L. Rev. 1435, 1447 (2010); Katharine K. Baker, *Gender and Emotion in Criminal Law*, 28 Harv. J. L. & Gender 447, 447 (2005); Robert A. Prentice, *Chicago Man, K-T Man, and the Future of Behavioral Law and Economics*, 56 Vand. L. Rev. 1663, 1672 (2003); Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 Yale L. J. 1331, 1375–77, 1414 (1997).

at trial and respective consequences may outweigh those two considerations, leading to a "rational" decision that lies outside the shadow model.

Understandably, lower courts have struggled to apply the rational inquiry from *Lee*. Some courts have adopted the subjective standard established in *Lee*, and evaluate the defendant's assertions in light of her specific circumstances, regardless of whether a reasonable person in the defendant's shoes would have made the same choice. But, the muddled articulation of the inquiry in *Lee* has led to other courts applying an objective reasonableness standard, examining the defendant's *post hoc* assertions in the context of what a reasonable defendant would do in the defendant's position.

While *Lee* and many lower courts openly reject the "hypothetical-reasonable-defendant" standard, the rational inquiry by its nature requires a determination of what rational people do in these situations. This conflict is why the *Lee* Court struggled with laying out the inquiry, and lower courts have subsequently struggled to apply it. It simultaneously rejects an objective inquiry while also applying an inherently objective standard.

In perhaps the most precise statement of what the rational inquiry requires, the Supreme Court of Indiana in *Bobadilla v. State* instructs that *Lee* provides courts with "helpful pieces of guidance," including that "[r]eviewing courts, therefore, should be asking what an individual defendant would have done, not what hypothetical defendants would do in similar situations. What is rational for one defendant may not be rational for the next—it depends on the defendant's particular circumstances."[87] The court pointed to the example of Lee, who, because of his strong connections to the United States, found "deportation just as dire as prison."[88] The *Bobadilla* court explained that the Court in *Lee* "expressly rejected any categorical rules whereby the prosecution could negate a defendant's prejudice claim by pointing out that he had no viable defense or that the government had a particularly strong case against him."[89] Furthermore, "[e]ach defendant's special circumstances should show why it could have been rational for that defendant to take his chances at trial and perhaps be deported rather than plead guilty and certainly be deported."[90] In *Bobadilla*, the Indiana Supreme Court overturned its previous decision, *Segura v. State*, explaining that "*Segura's* hypothetical-reasonable-defendant standard does not square with *Lee's* this-rational-defendant inquiry."[91] These key points from *Lee*, as interpreted by the Indiana Supreme Court, seem to spell out the prejudice inquiry that the Court intended: an inquiry focused on the particular circumstances of an individual defendant, supported by contemporaneous evidence, demonstrating that it would have been rational for that individual defendant to reject the plea in favor of going to trial.

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[87] Bobadilla v. State, 117 N.E.3d 1272, 1286 (Ind. 2019) (internal quotation marks and citations omitted).

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.* at 1287.

By comparison, the Fourth Circuit's interpretation of the rational inquiry is significantly more muddled. The Fourth Circuit interpreted it as requiring that the defendant "need not demonstrate that rejecting the plea agreement was the best objective strategy or even an attractive option. He need only demonstrate that, from the *perspective of a reasonable person in his position*, rejecting the plea agreement would have been rational."[92] Here, the court imports language that imposes an objective standard. However, that same paragraph concludes with, "to determine whether a particular defendant would have rejected a plea deal, we look to evidence regarding what is important to the defendant asserting the ineffective assistance claim."[93] This back-and-forth of reasonable person versus individual defendant (reasonable or not) seems to mirror the same push and pull of *Lee*. Ultimately, however, the Fourth Circuit in *Murillo* sticks to the circumstances of Murillo's case and confines its inquiry to Murillo himself, holding that "the evidence demonstrates a reasonable probability that, had Appellant known the true and certain extent of the consequences of his guilty plea, he would have refused it."[94]

Other courts, however, have not applied the rational inquiry in such a nuanced manner. The Superior Court of Connecticut, after quoting extensively from *Lee*, held that a defendant failed to establish prejudice because he "failed to establish the reasonable probability that any other beneficial disposition or diversionary program was likely to have been available and/or acted upon favorably by the court and prosecuting authority."[95] In doing so, the court seems to apply a "reasonable person in the defendant's position" standard, in that it implies that a reasonable person under the circumstances would not rationally reject the plea agreement offered to the defendant because no more favorable options were available. A lack of favorable options does not singularly indicate that the individual defendant would have accepted the plea agreement had he been properly advised.[96]

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[92] United States v. Murillo, 927 F.3d 808, 817 (4th Cir. 2019) (emphasis added) (internal citations and quotation marks omitted) (citing United States v. Swaby, 855 F.3d 233, 244 (4th Cir. 2017)).

[93] *Murillo*, 927 F.3d at 818.

[94] *Id.* at 819.

[95] Echeverria v. CSSD, No. CV164008035, 2017 WL 3975566, at *12 (Conn. Super. Ct. July 26, 2017).

[96] In another line of cases, courts have held that undocumented defendants categorically cannot prove prejudice because they could have been deported regardless of the outcome at trial. These courts reason that when a defendant is undocumented, he is already subject to deportation regardless of criminal conviction and so "the risk of deportation would not reasonably have affected [the defendant's] plea decision." Simon v. State, No. 03-17-00215-CR, 2018 WL 3468688, at *7 (Tex. App. July 19, 2018). In *State v. Jeminez*, the North Carolina Court of Appeals recognized the fallacy of this stance and examined the applicability of a variety of immigration consequences and forms of relief, including mandatory detention, discretionary cancellation of removal, and inadmissibility. 853 S.E.2d 265, 270 (N.C. Ct. App. 2020). Holding that the undocumented defendant should have been warned of the possibility of becoming ineligible for cancellation of removal and/or becoming permanently inadmissible, the court remanded to the trial court to make findings of fact regarding "the importance Defendant placed on remaining in the country." *Id.* at 275. To categorically hold that undocumented

In another case, the Ohio Supreme Court analyzed whether it would have been rational for the defendant to *accept* the plea deal presented. It did not analyze the proper question, which was whether, with proper advising, it would have been rational for him to *reject* it.[97] The reversal of the inquiry allowed the court to consider what actually happened instead of engaging in the hypothetical, leading the court to conclude that it was rational for the defendant to accept a plea that "significantly reduced his exposure to prison time," particularly where "he ultimately succeeded in avoiding a prison sentence altogether."[98]

The dissent explains why this reversal is problematic:

> It looks like he got a pretty good deal, so what does it matter if he did not understand that he had zero chance of staying in the country? It matters quite a bit. If a defendant has been misinformed about facts that are critical to his decision to plead guilty, then his plea is not knowing, voluntary, or intelligent, let alone rational. It does not comport with due process to conclude that there was no prejudice – despite the fact that the defendant was misinformed about a critical issue – just because some of the plea terms unrelated to that issue were favorable to the defendant. Our role in this aspect of the inquiry is to determine whether rejecting a guilty plea would have been a rational choice, not whether it was the *only* rational choice or the *best* possible choice.[99]

The fact that the defendant got a good (or, even, great) deal is irrelevant to whether he would have rejected that deal had he been adequately informed of its consequences. Ultimately, the rational inquiry is a means to an end: determining whether the defense attorney's ineffective assistance prejudiced the defendant. A defendant is prejudiced when he enters a misinformed plea, no matter how objectively "good" that plea may be, because that plea was secured through a deprivation of his constitutional rights. Therefore, the rational inquiry must focus on whether this particular defendant would have *rejected* the plea and insisted on going to trial.

These decisions show the confusion around whether the inquiry requires a subjective standard, an objective standard, or an objective standard with subjective elements and whether the inquiry should be confined to the factors underlying the shadow model or factors underlying other decision-making theories. The lower courts' confusion also evidences the need for a more clearly articulated test that captures the full nuance of noncitizen defendant decision-making in the plea bargain context.

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defendants could not rationally reject a plea agreement because they do not consider the risk of deportation highlights the issues with the rational inquiry and disregards the incredibly complex nature of both immigration law and defendant decision-making.

[97] State v. Bozso, 2020-Ohio-3779, 164 N.E.3d 344, 351, at ¶ 31.

[98] *Id.*

[99] *Id.* at ¶ 40 (Donnelly, J., dissenting).

ii. Evidence of Decision-Making

The second thread within *Lee* is the evidentiary portion of the inquiry. As noted, *Lee* resolved a circuit split that sprang up in the wake of *Padilla*, answering the question of how courts should determine whether the defendant was prejudiced by his attorney's bad advice on the immigration consequences of a plea. *Lee* seemingly resolved the issue, but given the totality-of-the-circumstances approach adopted in *Lee*, it is not unusual that lower courts diverge in how they handle these issues. For the purposes of this section, the critical observation is how the courts talk about information gathering and decision-making by defendants.

We focus next on the factors identified by *Lee* as relevant to the totality-of-the-circumstances determination in IAC cases involving noncitizens. These include 1) any contemporaneous statements made to others by the defendant; 2) any on-the-record admonishments to the defendant made by the judge during the plea hearing; and 3) the likelihood of success at a hypothetical trial, the risks the defendant would have faced at trial, and the benefits she received from plea bargaining. As we explore here, these categories of evidence map onto the theories of decision-making adopted by *Lee* and lower courts.

1. Contemporaneous Statements

Lower courts have largely latched onto the language from *Lee* that requires the reviewing court to examine statements the defendant contemporaneously made at the time of the plea. Specifically, courts examine whether these contemporaneous statements indicate the importance of immigration consequences to the defendant's decision-making.[100] In *Lee*, the Supreme Court highlighted the substantial evidence Lee presented showing that immigration consequences were at the forefront of his mind while he was fighting his criminal case.[101] Lee asked his lawyer many times about the immigration consequences of his plea, and he was repeatedly assured—incorrectly—that he would face no immigration issues.[102] The *Lee* Court found these statements central to the prejudice inquiry—that, indeed, Lee would have proceeded to trial if he had understood that his plea put him in jeopardy of deportation.

Lower courts have similarly searched for such contemporaneous statements of the defendant's priorities. These statements do not have to be on the record, although, as we discuss below, the court often considers the recorded colloquy as evidence *against* the defendant. What matters to courts is that

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[100] *See* Gish v. Hepp, 955 F.3d 597, 606–07 (7th Cir. 2020), *cert. denied*, 141 S. Ct. 681 (2020) (mem.); Miller v. State, 2018 WY 102, ¶ 23, 424 P.3d 1284, 1291 (Wyo. 2018); *Bozso*, 2020-Ohio-3779, 164 N.E.3d 344, 351, at ¶ 31.

[101] Lee v. United States, 137 S. Ct. 1958, 1968 (2017).

[102] Lee v. United States, 2013 U.S. Dist. LEXIS 186239, at *1, 6–10 (W.D. Tenn. Aug. 6, 2013), *aff'd*, 825 F. 3d 311 (6th Cir. 2016), *rev'd*, 137 S. Ct. 1958 (2017).

the defendant made statements *to others* indicating he would not have taken the plea if there was a risk of deportation.[103] As a corollary, lower courts have also expressed skepticism about *post hoc* claims by the defendant that he would have made a different decision with correct information.[104]

For instance, the Court of Appeals for Texas found for a defendant who provided affidavits from the original paralegal in his criminal case confirming his account that immigration consequences were paramount to him at the time of his plea and that he expressed as much to his lawyers and others.[105] In another case, *United States v. Murillo*, the Fourth Circuit found for a defendant who could show that in addition to multiple statements to his lawyer about the importance of staying in the country, he had made specific efforts to retain an immigration-savvy criminal defense attorney.[106] In *Murillo*, the defendant could show that he retained his lawyer precisely because she held herself out as being qualified in immigration law.[107] The record also showed that his mother, fiancée, and fiancée's mother asked the lawyer about the deportation consequences of the plea.[108] Even the drafts of the plea agreement demonstrate that the lawyer focused on immigration consequences during the negotiation process.[109]

Contemporaneous statements are particularly important if supported by evidence of the defendant's strong ties to the United States. In *Klaiber v. United States*, the defendant was able to show that remaining in the country was of "paramount importance."[110] He had lived in the United States since the age of eight.[111] His entire extended family lived in the United States, and

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[103] *Lee*, 137 S. Ct. at 1967 ("Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences," including who the defendant spoke to about the decision to take a plea and why the defendant made the decision to plea).

[104] *E.g.*, United States v. Crain, 877 F.3d 637, 650 (5th Cir. 2017); People v. Titus, 2020 Guam 16 ¶ 37; *Bozso*, 2020-Ohio-3779, 164 N.E.3d 344, 349, at ¶ 21; Osei v. United States, No. 18-0063, 2019 WL 251855 (E.D. Pa. Jan. 16, 2019).

[105] Munoz v. State, No. 01-18-00882-CR, 2020 Tex. App. LEXIS 2770, at *30 (Tex. App. Apr. 2, 2020) ("In her affidavit, the trial counsel's paralegal corroborated appellant's testimony. [The paralegal] testified that, in the months preceding his plea, appellant was in the midst of meetings with immigration officials about his citizenship and that he wanted to go to trial").

[106] United States v. Murillo, 927 F.3d 808, 818 (4th Cir. 2019).

[107] Murillo's attorney, as of the time of the decision, hosted a radio show called *Tu Abogada Latina* ("Your Latina Lawyer") where she discussed immigration issues and invited listeners to come to her office for free immigration law consultations. *Id.* at 811 & n.2. Despite her alleged qualifications, Murillo's attorney "advised him that, if he pled guilty to the lesser included offense, deportation was a mere possibility that he could fight in immigration court." *Id.* at 811. In fact, the lesser-included offense to which Murillo pleaded guilty was conspiracy to distribute cocaine, an aggravated felony under the INA that subjects the convicted defendant to mandatory deportation. The court noted that "throughout her discussions with Appellant regarding the plea agreement, [the attorney] assured Appellant that he would be able to fight deportation in immigration court," an assurance which was incorrect. *Id.* at 812.

[108] *Id.*

[109] *Id.* at 812 (finding that the lawyer wrote notes to herself to "ask to omit immigration waivers" and negotiated to omit sections of the plea agreement, like "Consent Given for Removal from the United States").

[110] Klaiber v. United States, 471 F. Supp. 3d 696, 711 (D. Md. 2020).

[111] *Id.* at 698–99.

he had no connections to his home country.[112] The Court focused on the fact that the defendant was clearly willing to defend against the charges, although his chances of success were "grim," in order to stay in the country.[113]

However, where contemporaneous statements to others do not exist, courts have often rejected a defendant's IAC claim, even when the defendant provided an affidavit about his own thinking about the plea.[114] For instance, in *People v. Titus*, the court rejected the defendant's prejudice claim because he could not provide any contemporaneous statement about his priorities.[115] As the court noted, "[t]here is no evidence on the record, in the form of declarations or otherwise, from sources other than [the defendant] to substantiate his assertion that he would have rejected a plea and proceeded to trial."[116] The Ohio Supreme Court came to the same conclusion in *State v. Bozso*. The defendant had resided in the United States for over thirty years, and there were many weaknesses in the state's case against him. Additionally, in a subsequent affidavit, he stated that he would not have pleaded guilty had he known that relief from deportation was not available to him. Despite all these facts, the Supreme Court of Ohio still found against the defendant because, among other reasons, there were no contemporaneous statements reflecting his priority to stay in the country.[117]

2. *On the Record Admonishments to the Defendant*

Many courts have looked to the on-the-record admonishments by the trial court to determine whether the defendant did indeed understand the deportation risks. Some courts have held that an accurate warning about deportation consequences from the trial court can cure an attorney's incorrect advice to the defendant.[118] For some appellate courts, these in-court warnings have made up for the poor advice by defense counsel because they demonstrate that the defendant was on notice of the deportation consequences. In *Lee*, the defendant had received a warning from the trial court that his conviction could lead to deportation consequences, but as the Supreme Court

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[112] *Id.* at 711.

[113] *Id.* at 711–12.

[114] The courts' discussion of contemporaneous statements does not include cases involving defendants who did not know their immigration status at the time of pleading guilty (for instance, defendants who may have come to the country as small children and did not realize they were not citizens). This exclusion makes sense given the courts' focus on whether the defendant would have rejected the plea at the time she was offered it, but of course it ignores a whole category of people who may unknowingly plead guilty to a crime that makes them deportable.

[115] People v. Titus, 2020 Guam 16 ¶ 37.

[116] *Id.*

[117] State v. Bozso, 2020-Ohio-3779, 164 N.E. 3d 344, 350, at ¶ 21. Although, as we note in Part II.b.iii., the court failed to acknowledge that Bozso was in immigration detention at the time of the hearing and therefore could not have provided additional evidence at the hearing that would have been helpful to his case.

[118] United States v. Hernandez-Monreal, 404 F. App'x 714, 715 (4th Cir. 2010). *But see* United States v. Akinsade, 686 F.3d 248, 250 (4th Cir. 2012) ("general and equivocal" warnings do not suffice).

noted, when Lee was asked whether this warning impacted his decision to plead guilty, he responded affirmatively.[119] Lee then followed up by saying he did not understand the judge's warning and asked to speak to his attorney.[120] At that point, Lee's counsel "assured him that the judge's statement was a 'standard warning,'" and Lee proceeded with the plea.[121] But the on-the-record plea colloquy demonstrated that Lee had informed the judge that any chance of deportation would affect his decision about whether to plead guilty.[122]

Yet, for most defendants, pro forma warnings by a judge about the deportation consequences of a criminal conviction—which are now commonplace throughout the country[123]—generally count against the defendant in these proceedings. For instance, in one case out of the Eastern District of New York, the Court found against a defendant who had previously heard from two judges that his conviction would lead to deportation consequences because both times he "affirmed under oath" that he understood the contents of the plea colloquy.[124] Although the court acknowledged that such statements by the judge are not always sufficient to ensure the defendant's understanding, they found that he provided "no contemporaneous evidence that [he] did not understand that he was likely to face deportation."[125] Here then, the court focused on the defendant's lack of contemporaneous accounts, which would have conflicted with his on-the-record statements acknowledging that he understood the consequences of his plea.

3. Likelihood of Success at Trial, Risk Appellant Would Have Faced at Trial, and Benefits Received from a Plea

We tackle these three factors—the likelihood of success at trial, the risk the appellant would have faced at trial, and the benefits the appellant received from the plea—together because they collectively represent a line of questioning by courts that can be characterized by the basic query: exactly how good was the deal? As we explained in Part II.a., this question is crucial to the "shadow of trial" model adopted by the courts.

The sentencing differential between the plea on the table and the hypothetical sentence after trial is important to courts in applying the prejudice

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[119] Lee v. United States, 137 S. Ct. 1958, 1968 (2017).
[120] *Id.*
[121] *Id.*
[122] After *Lee*, other courts have found that defendants who demonstrate overwhelming evidence that their main priority was to stay in the country will not have their IAC claim defeated merely because they received an on-the-record warning from the judge. *See, e.g.*, United States v. Murillo, 927 F.3d 808, 819 (4th Cir. 2019).
[123] For instance, the Federal Rules of Criminal Procedure direct judges to warn defendants about the immigration consequences of a conviction. FED. R. CRIM. P. 11(B)(1)(O). Many states also require the same warning. *See, e.g.*, Ariz. R. Crim. P. 17.2(f); Cal. Penal Code § 1016.5; Conn. Gen. Stat. Ann. § 54-1j; Mass. Gen. Laws Ann. ch. 278, § 29D; N.Y. Crim. Proc. Law § 220.50(7).
[124] Superville v. United States, 284 F. Supp. 3d 364, 375 (E.D.N.Y. 2018).
[125] *Id.*

test post-*Lee*, even when the defendant expressed the importance of avoiding deportation. For instance, in a Connecticut case, the defendant accepted a plea deal to a fine of $10,000 and no incarceration.[126] The court found against him because his counsel testified at a post-conviction hearing that the defendant's main concern was avoiding a "double digit" sentence,[127] which was hypothetically possible if the defendant went to trial on the several felony charges he was facing.[128] The court reasoned that the ten additional years the defendant was facing after trial was a critical factor in his decision-making,[129] even though the prosecutor had actually agreed to a non-incarceratory sentence. Therefore, the court directly weighed the deportation risks of the plea on the table against the sentence after trial. The court acknowledged that there were no non-deportable offense plea offers in the case,[130] yet they failed to explore whether the attorney had sought any such charges through pre-plea negotiation. Although judges tend not to explore the pre-plea negotiations between the parties,[131] the Supreme Court in *Padilla* opened the door to this sort of inquiry by explicitly noting that lawyers may "creatively" negotiate immigration-safe consequences with their adversaries.[132]

Other courts also highlight the significant difference between the potential after-trial sentence and the one on the table. In *Superville v. United States*, the defendant faced a ten-year mandatory minimum sentence if he refused to cooperate with the government and was offered a significantly reduced plea sentence. The court in *Superville* specifically noted that unlike Lee, who faced only a small differential between his plea sentence and post-trial sentence, the defendant in *Superville* was looking at an extra decade in prison should he have decided to go to trial.[133]

Alternatively, where the potential sentence after trial is relatively low, courts are inclined to find that the defendant's chances of rejecting the plea would have gone up. For instance, in *Bobadilla,* described above, the Supreme Court of Indiana found for a defendant who was a teenager at the time he pleaded guilty to two low-level misdemeanors—crimes that ultimately made him deportable.[134] As the court put it:

> [W]hen the then-teenager exited the courtroom, he didn't know that his guilty plea made him a deportable felon under federal im-

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[126] Echeverria v. CSSD, No. CV164008035, 2017 WL 3975566, at *11–12 (Conn. Super. Ct. July 26, 2017).

[127] *Id.* at *13.

[128] *Id.* at *11.

[129] *Id.* at *13.

[130] *Id.*

[131] *See* Rishi Raj Batra, *Judicial Participation in Plea Bargaining: A Dispute Resolution Perspective*, 76 Ohio St. L.J. 565, 572–74 (2015) (listing states that ban judicial intervention in plea bargaining).

[132] Padilla v. Kentucky, 559 U.S. 356, 373 (2010).

[133] *Superville*, 284 F. Supp. 3d at 375. *See also* State v. D.K., No. A-0460-17T4, 2018 N.J. Super. Unpub. LEXIS 842 (N.J. Super. Ct. App. Div. Apr. 12, 2018) (highlighting that defendant received three-year plea deal in exchange for dismissal of child abuse and bail jumping, and avoided potential ten-year sentence).

[134] Bobadilla v. State, 117 N.E.3d 1272, 1289 (Ind. 2019).

> migration law. [Defendant]'s life changed the moment he pleaded guilty to stealing less than $20 of merchandise from Walmart. Upon realizing his plea's dire implications, a desperate [Defendant] sought post-conviction relief, alleging ineffective assistance of counsel: his attorney provided deficient performance that prejudiced him. We agree.[135]

II. Flaws with the Current IAC Model in the Noncitizen Context

The previous section laid out the dominant theory of decision-making that supports *Lee* and its progeny, as well the evidence of decision-making that courts rely on to determine how a particular defendant would have made a plea decision. In this section, we unearth the deep problems with the courts' analysis in both regards. Our first critique examines how courts apply decision-making theories in IAC cases involving noncitizens. Specifically, this Part argues that the "shadow of trial" model and the rationality tests that flow from it are inadequate to understand how and why defendants, particularly noncitizens, make decisions about whether to accept or reject a plea. It also explores other theories of decision-making that more realistically reflect how people make weighty decisions. The second critique focuses on the evidence of decision-making that courts rely on and points to three on-the-ground realities of plea bargaining that are largely ignored by courts, resulting in unfair outcomes for defendants suffering actual harm in the immigration system.

a. Problems with the Theories of Decision-Making in IAC

As we previously noted, the principal inquiry under the prejudice prong of an IAC claim in the plea bargain context focuses on the defendant's decision-making processes. It asks the question, "If the defendant had been properly advised by counsel, would she have rejected the plea deal and opted instead to go to trial?" To answer this question, the court must decide how the individual defendant weighed certain factors at the time the decision was made and whether those factors would have been weighed differently had she known the risk of deportation. This inquiry examines the defendant's decision-making within a hypothetical circumstance. For this reason, courts should rely on evidence-based research into defendant decision-making under similar circumstances. Yet, the Court in *Lee* and lower courts in subsequent cases have instead either disregarded the available research entirely or relied on theories that have drawn criticism from experts in the field and have evolved with more contemporary research.

Courts have relied on faulty assumptions and outdated theories in other cases about plea bargain decision-making. As Lucian Dervan and Vanessa

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[135] *Id.* at 1276.

Edkins demonstrated, the Supreme Court's most important plea case, *Brady v. U.S.*, rests on a faulty assumption about whether plea bargaining leads to innocent defendants falsely condemning themselves with guilty pleas.[136] Although the Supreme Court has acknowledged that one of the problems with plea bargaining is that innocent people might be coerced into pleading guilty,[137] there has not been a full-throated repudiation of this core principle of *Brady*, even though *Brady* rests on the contention that plea bargaining is not unduly coercive.

In *Brady* and other major plea-bargaining cases, the Court continues to adhere to the notion that people make rational decisions about pleading guilty, a notion based on mistaken beliefs about how people make decisions and about the reality of the modern criminal system.[138]

With the recent recognition of the prevalence of plea deals over trials, there has been a corresponding increase in the study of defendant decision-making. This section introduces some of the prevalent theories, the limitations of those theories, and the value that research offers to courts as they weigh IAC claims in the plea bargain context. It advocates for the inclusion of broader theories in evaluating prejudice in IAC claims.

i. Shadow of Trial Model

As we outlined in Part I, the *Lee* Court and lower courts applying *Lee* implicitly adopted what is known as the "shadow of trial" model. This theory, which has its roots in an article about divorce settlement[139] and has been

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[136] As Dervan and Edkins make clear, the primary assumption at the heart of *Brady*, that innocent people won't plead guilty, is flawed. Dervan and Edkins empirically tested the validity of the assumption and found that with a particular set of pressures common in the criminal system, innocent people will plead guilty. Lucian Dervan & Vanessa Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study on Plea Bargaining's Innocence Problem*, 103 J. OF CRIM. AND CRIMINOLOGY 1, 48 (2013).

[137] Lafler v. Cooper, 566 U.S. 156, 185 (2012) (Scalia, J., dissenting).

[138] There are other areas of the law where the courts have been more open to embracing social science literature. For instance, courts regularly rely on the social science on eye-witness identification, particularly cross-racial identification. In 2017, the New York Court of Appeals addressed the issue head-on, noting that "[m]istaken eyewitness identifications are the single greatest cause of wrongful convictions in this country. . . . Inaccurate identifications, especially misidentifications by a single eyewitness, play a role in the vast majority of post-conviction DNA-based exonerations in the United States. . . . Social scientists have found that the likelihood of misidentification is higher when an identification is cross-racial." People v. Boone, 30 N.Y.3d 521, 527–28 (2017). The New York Court of Appeals held that where the witness's identification of the defendant is at issue, the trial court must give an instruction on the cross-race effect, upon request. *Id.* at 535–36. New York followed other states which had already held the same. *See, e.g.*, Commonwealth v. Bastaldo, 472 Mass. 16, 32 N.E.3d 873, 877 (2015); *State v. Cabagbag*, 127 Hawai'I 302, 277 P.3d 1027, 1029 (2012); *State v. Henderson*, 208 N.J. 208, 27 A.3d 872, 928–29 (2011).

[139] *See generally* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979). It was subsequently applied in the plea bargain context. *See generally, e.g.*, Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969 (1992); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992).

widely applied to civil litigation,[140] has become the dominant theory on defendant decision-making. The model posits that defendants evaluate the plea offer in comparison to the perceived outcome at trial and the sentence expected to result. "In other words, parties forecast the expected sentence after trial, discount it by the probability of acquittal, and offer some proportional discount."[141] It has been described as a "purely economic strategy" involving "a strict weighing of the pros and cons or attempts to secure the most optimal outcome with the given circumstances."[142] It is solidly based on the notion that a defendant has full knowledge of these "pros and cons" and can accurately weigh them to make a decision that reflects the best result, objectively speaking.[143]

In recent years, the "shadow of trial" model has drawn criticism from social science and legal scholars who have called for its expansion to include more nuanced positions. Beginning in 2004, Stephanos Bibas hypothesized that "many plea bargains diverge from the shadows of trials." Bibas deemed the model too simplistic because it does not factor in "structural impediments" and "psychological biases," which includes things like the quality of the attorney (structural) and the defendant's own self-serving biases and loss aversion (psychological).[144] Bibas noted that "we do not know what the trial rate would be without these influences," but perhaps more important is that these influences "create inequities based on wealth, sex, age, intelligence,

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[140] Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2464 & n.1 (2004).

[141] *Id.* at 2464.

[142] Vanessa A. Edkins & Lucian E. Dervan, *Freedom Now or a Future Later: Pitting the Lasting Implications of Collateral Consequences Against Pretrial Detention in Decisions to Plead Guilty*, 24 PSYCH., PUB. POL'Y, & L. 204, 205 (2018).

[143] As other scholars have noted, "the shadow model seemingly assumes that individuals engaging in plea bargaining know their conviction probability and potential trial sentence (or are provided with educated predictions from their attorneys), and can then use those values to accurately calculate their trial value. Our results raise questions about this assumption and the possibility that individual deviation from the shadow model may, in part, be due to a lack of ability to perform the mathematical calculations required by the model. Scholars have discussed the role of education during plea negotiations in the past (Bibas 2004; Redlich et al. 2017). However, perhaps the key is not education in general, but mathematical abilities in particular." Kevin Petersen et al., *Diverging from the Shadows: Explaining Individual Deviation from Plea Bargaining in the "Shadow of the Trial"*, J. EXPERIMENTAL CRIMINOLOGY, at 18 (Nov. 7, 2020), https://doi.org/10.1007/s11292-020-09449-4, *archived at* https://perma.cc/6BXR-48DE.

[144] Other structural impediments include "lawyer quality, agency costs, bail and detention rules, sentencing guidelines and statutes, and information deficits." Psychological biases include "[o]verconfidence, self-serving biases, denial mechanisms, discounting of future costs, loss aversion, risk preferences, framing, and anchoring." Bibas, *supra* note 140, at 2468–69. Lucian Dervan developed a theory called "the benefit distribution theory" that expanded on the "shadow of trial" model to account for these impediments. Dervan contends that the first phase of plea negotiations involves each side evaluating the likelihood of success at trial and deciding on their acceptable terms for a plea deal. In the next phase, the prosecution looks at all available benefits to the defendant, such as charge bargaining, to overcome some of the structural and psychological impediments by incentivizing the defendant to accept the plea deal. Sentencing and non-sentencing benefits are distributed to the defendant in exchange for an acceptance of the plea deal. *See generally* Dervan, *supra* note 75, at 239.

lawyer quality, and other characteristics irrelevant to guilt."[145] Additionally, as other scholars have noted, the model does not account for "defendant race—which is known to affect trial outcomes, plea recommendations, and plea decisions."[146]

In subsequent years, Shawn Bushway and Allison Redlich discovered through evaluation of empirical data that while the "shadow of trial" model could "predict accurate aggregate estimates of the plea discount, the individual estimates appear to be deeply flawed."[147] They identified a need for a theoretical model that accurately predicts the plea discount at the individual level.[148] Another study aimed at understanding the factors that contribute to an individual's adherence to or deviation from the "shadow of trial" model.[149] The study suggests that there is an inverse relationship between the probability of conviction—a central tenet of the shadow model—and shadow model adherence. Meaning, individuals are most likely to deviate from the model when the probability of conviction is low and most likely to adhere when the probability of conviction is high.[150] An "inherent assumption" of the shadow model is "probability linearity," and this study questions that assumption for certain individual defendants.[151]

These criticisms, evolutions, and calls for further research have identified what may be a key disadvantage of relying on the "shadow of trial" model: while the model is capable of predicting outcomes at the aggregate level, it is unreliable in its present state at the individual level.[152] In addition, the model does not account for the fact that defendants often do not have all relevant information about the likely outcomes after trial and therefore cannot be making fully knowledgeable decisions.[153] Yet, courts, including *Lee*, routinely apply it to individual defendants as the foundation for determining how that defendant would have made a decision.

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[145] Bibas, *supra* note 140, at 2497.

[146] Petersen, *supra* note 143, at 3.

[147] Shawn Bushway & Allison D. Redlich, *Is Plea Bargaining in the "Shadow of the Trial" Just a Mirage?*, 28 J. Quantitative Criminology 437, 450 (2012).

[148] *Id.* at 450–51.

[149] *See generally* Petersen, *supra* note 143, at 3.

[150] *Id.* at 16.

[151] *Id.* at 17.

[152] *Id.* at 5.

[153] As Redlich has explained, the "shadow of trial" model involves weighing the probability of conviction at trial, which is influenced by evidence strength. A recent study Redlich and her co-author, Samantha Luna, conducted suggests that "access to discovery information impacts defendants' ratings of the strength of the evidence against them and perceptions of the information itself, which in turn affects the decision to accept or reject pleas. Without access to full discovery information, particularly potentially exculpatory information, defendants necessarily have limited ability to make fully informed plea decisions, which raises concerns about the fairness and validity of bargaining and the wrongful conviction of innocents." Samantha Luna & Allison D. Redlich, *Unintelligent Decision-Making? The Impact of Discovery on Defendant Plea Decisions*, 1 Wrongful Conviction L. Rev. 314, 332 (2020) (internal citations omitted).

ii. Other Models

It is important to note that although the "shadow of trial" model has been the most influential theory of plea decision-making, several other theories also attempt to explain how defendants make decisions. Some of these theories feature more prominently than others in the caselaw (although still implicitly rather than explicitly).

For instance, in many post-*Lee* cases, courts pointed to the near certainty of a defendant's conviction at trial when determining that she would not, in fact, have rejected the initial plea.[154] This theory is supported by a line of research that seeks to understand how the strength of evidence impacts decisions to enter into plea agreements. In one such study, researchers examined how court-appointed defense attorneys gauged the strength of the evidence prior to plea bargaining. They found that defenders assess the evidence against their client through the lens of "sufficiency, legality, and persuasiveness."[155] They then make plea recommendations to their clients, which likely factor into the client's decision to accept or reject the plea. Another study involving criminal defense attorneys confirmed that the "likelihood of conviction based on the strength of the evidence and potential sentence are important considerations in [the] plea bargaining decision-making" of attorneys.[156]

While these studies do not specifically center on the defendant's personal decision-making process, they shed light on the information a defendant might receive from her attorney as she weighs her options. Where recent studies have recognized that some defendants may struggle with evaluating the probability of success at trial,[157] the defense attorney's evaluations and recommendations likely have a significant impact on the defendant's decision-making.[158] Furthermore, although these IAC claims result from attorneys giving poor advice, courts tend not to focus on the other aspects of attorney performance that may influence the client's decision-making. Indeed, even under the "shadow of trial" model, the lawyer's counsel is often

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[154] Price v. United States, 2018 U.S. Dist. LEXIS 209925, at *17 (E.D. Mich. Dec. 13, 2018); State v. D.K., No. A-0460-17T4, 2018 N.J. Super. Unpub. LEXIS 842, at *16–18 (N.J. Super. Ct. App. Div. Apr. 12, 2018); Simon v. State, No. 03-17-00215-CR, 2018 WL 3468688, at *17–18 (Tex. App. July 19, 2018).

[155] Debra S. Emmelman, *Gauging the Strength of Evidence Prior to Plea Bargaining: The Interpretive Procedures of Court-Appointed Defense Attorneys*, 22 L. & Soc. Inquiry 927, 931 (1997).

[156] Greg M. Kramer et al., *Plea Bargaining Recommendations by Criminal Defense Attorneys: Evidence Strength, Potential Sentence, and Defendant Preference*, 25 Behav. Sci. L. 573, 580 (2007).

[157] *See* Petersen, *supra* note 143, at 18.

[158] One study found that "being advised to accept the guilty plea did significantly affect plea decisions for both innocent and guilty participants." Kelsey S. Henderson, *Investigating Predictors of True and False Guilty Pleas*, 42 L. & Hum. Behav. 427, 438 (2018). Interestingly, researchers found that the effect was greater on innocent participants, who were 14.5 times more likely to accept a false guilty plea when their advocate recommended doing so. *Id*

the only thing that the defendant relies on when assessing the after-trial outcomes. A defendant with a bad lawyer is likely making bad choices.

Other theories have received less attention from courts. For instance, researchers have borrowed "prospect theory" (most often used in psychology pertaining to economics and political science)[159] to understand a defendant's thought process. Prospect theory "lends itself well to the plea bargaining decision" because it demonstrates that "individuals will (a) see their options in terms of gains and losses relative to their current standing, placing a greater weight on a loss than on a gain, and (b) prefer certain outcomes to those that only may or may not occur."[160] Prospect theory, as applied to defendants in the plea bargain context, recognizes that defendants do not make the decision to accept or reject a plea in a vacuum. Instead, they evaluate their prospects in relation to their circumstances at the time of the decision. This theory also recognizes that what one defendant views as a "gain" or "loss" may not be similarly categorized by another defendant.[161] For example, "[a] deal that guarantees no jail time will be seen differently . . . by a defendant currently in pre-trial detention than by a defendant who is out on bail because their starting points are different."[162] Unlike the "shadow of trial" model, prospect theory takes into account individual circumstances, providing a more nuanced understanding of defendant decision-making.

Prospect theory is considered to fall within an area of psychology called "bounded rationality," which is "the notion that human rationality is limited by the nature of the decision problem, the cognitive limitations, and the time available for the decision."[163] As researchers have noted, "in real-life situations, the information relevant to a decision often arrives sequentially or changes over time."[164] Recently, researchers have suggested that prospect theory may not accurately capture situations in which the relevant information for making a decision is communicated to a decision-maker sequentially rather than simultaneously.[165] This inability of the theory to account for the sequential presentation of information may affect the accuracy of the theory's application in many contexts, including in the plea decision context where a defendant rarely has all relevant information presented at once.

Research suggests that the timing and order in which information is presented impact how a decision-maker evaluates that information. When information is presented sequentially to a decision-maker, she may be more likely to place greater emphasis than appropriate on the last-received infor-

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[159] *See generally* Daniel Kahneman and Amos Tversky, *Prospect Theory: An Analysis of Decision under Risk*, 47 ECONOMETRICA 263 (1979).

[160] Edkins & Dervan, *supra* note 142, at 205 (internal quotation omitted).

[161] *See id.*

[162] *Id.*

[163] Philip Millroth et al., *Memory and Decision Making: Effects of Sequential Presentation of Probabilities and Outcomes in Risky Prospects*, 148 J. OF EXPERIMENTAL PSYCH. 304 (2019).

[164] *Id.* at 313.

[165] *See generally id.*

mation.[166] Similarly, simultaneous presentation of information led to "more comprehensive, extensive, and in-depth processing which helped to identify the optimal option."[167] This finding would suggest the opposite is true of sequential presentation. In one 2019 study, researchers concluded that "established assumptions of rationality may need to be reconsidered to account for the effects of memory in many real-life tasks,"[168] including, presumably, the task of deciding whether to accept a plea deal or go to trial. In the plea bargain context, the sequential presentation of information relevant to accepting a plea deal may lead to objectively poorer decision-making.

Turning back to the criminal context specifically, other studies have tried to determine the impact of time and subsequent consequences on defendant decision-making in light of current circumstances such as pre-trial detention. Two vignette-based studies put forth a theory "that when the immediate rewards of accepting a plea deal are too large, . . . future ramifications are given too light weight; that collateral consequences can only be rationally considered when they are not overshadowed by certain and immediate enticements."[169] Plea bargains, they posit, "take advantage of both prospect theory and temporal discounting" by placing defendants in a situation in which they must weigh their prospects but inevitably discount the future ramifications because the present circumstances are intolerable.[170] The two studies involved assigning participants guilt or innocence of a specified crime and certain collateral consequences, including pre-trial detention, lost employment, loss of licensure, and loss of public benefits and public housing.[171] The researchers found that pre-trial detention led to increased guilty pleas, noting that "[t]he theory of temporal discounting predicts that future consequences are down-played in light of immediate consequences and the current research seems to suggest that future consequences were certainly not given appropriate weight—knowledge of collateral consequences did not deter individuals from accepting a guilty plea."[172] Pre-trial detention seemingly makes an otherwise unattractive and irrational option into an attractive one: pleading guilty when one is, in fact, innocent.

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[166] *Id.* at 306. In the criminal context, this has been shown to have an effect on witness identifications.

[167] *Id.*

[168] *Id.* at 304.

[169] Edkins & Dervan, *supra* note 142, at 206.

[170] *Id.*

[171] *Id.* at 206, 213.

[172] *Id.* at 213. *But see*, Carlie Malone, *Plea Bargaining and Collateral Consequences: An Experimental Analysis*, 73 Vand. L. Rev. 1161, 1161 (2020) (finding that "communicating collateral consequences decreases the rate of plea acceptance, but the effect of communication dissipates as the difference between the plea bargain sentence and the potential sentence at trial grows larger."). Malone found that when defense counsel notifies defendants of collateral consequences, they are more likely to exercise their right to trial. Malone noted that the study expanded on the work of Edkins and Dervan by "testing the importance of collateral consequences in a situation where a plea bargain involves jail time, includes a more robust set of collateral consequences (including the loss of public benefits), and asks respondents to consider accepting a plea bargain in relation to increasingly severe sentences if convicted at trial." *Id.* at 1182.

Current social science research suggests that defendants do not uniformly make decisions. A multitude of factors specific to the individual defendant may impact her decision to accept or reject a plea, including, but not limited to, her psychological disposition, immediate needs, time pressures,[173] future goals, the timing and sequence in which she receives relevant information, her risk tolerance, collateral consequences, the evidence against her and her attorney's recommendation based on an evaluation of that evidence, and her perception of her prospects at trial. Furthermore, in the context of noncitizens specifically, trauma, guilt, and other emotions associated with the experience of noncitizens in contact with immigration and criminal courts also likely factor into noncitizen defendant decision-making.[174] Current social science literature recognizes that any one of these factors may weigh more heavily for any one defendant.

As used by the *Lee* Court and lower courts, the "shadow of trial" model emphasizes just two of these factors: the defendant's prospects at trial and the consequences of conviction by plea and by trial. By relying solely on this simplified shadow model, courts risk denying IAC claims for lack of prejudice on the grounds that the defendant would not have made the very decision that expanded research supports. The shadow model is a good place to start, but current research has expanded upon the simplified version used

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[173] The acceptance of a so-called "exploding" plea offer should, in and of itself, be a factor heavily considered by the court in examining how the individual defendant made her decision. These coercive but widely-used offers place immense pressures on defendants to make decisions quickly, often without sufficient information. "In case the coercion applied by the threat of a severely increased prison term, or oppressive pretrial detention, is not enough, many prosecutors exert additional pressure in the form of an 'exploding' plea, or a one-time offer that is only available for a limited period. Using this tactic, the prosecutor can place the accused in a high-pressure situation in which he or she is forced to consider the plea offer without the time necessary to make an informed decision. Because defense counsel frequently does not have the time to investigate, seek discovery, or litigate motions, he or she is rendered unable to serve as an effective advisor. In this sense the exploding plea offer routinely deprives the accused of his or her full right to counsel before making this vital decision. This is precisely the situation that confronted the defendants in the notorious Postville, Iowa, meatpacking plant raid." Jonathan A. Rapping, *Who's Guarding the Henhouse? How the American Prosecutor Came to Devour Those He Is Sworn to Protect*, 51 WASHBURN L. J. 513, 550 (2012).

[174] Evelyn H. Cruz, *Competent Voices: Noncitizen Defendants and the Right to Know the Immigration Consequences of a Plea Agreement*, 13 HARV. LATINO L. REV. 47, 50 (2010) ("Noncitizens without immigration status often carry a sense of guilt arising from their unlawful status, which affects their choices and interactions with the criminal courts."). The American Psychiatric Association recognizes that undocumented noncitizens, particularly, are at high risk for trauma and often experience trauma at varying stages of the migration process, including after immigrating. Divya Chhabra, M.D., et al., *Stress & Trauma Toolkit for Treating Undocumented Immigrants in a Changing Political and Social Environment,* AMERICAN PSYCHIATRIC ASSOCIATION, https://www.psychiatry.org/psychiatrists/cultural-competency/education/stress-and-trauma/undocumented-immigrants#:~:text=undocumented%20immigrants%20who%20have%20had,)%2C%20and%20substance%20use%20disorders.&text=however%2C%20undocumented%20immigrant%20Latinos%20use,than%20U.S.%2Dborn%20Latinos%20do (last visited Mar. 13, 2022), *archived at* https://perma.cc/3DDH-PW8V. Courts should also consult the field of emotion and decision-making when examining how and why a defendant made a particular decision. *See, e.g.*, Jennifer S. Lerner et al., *Emotion and Decision Making*, 66 ANN. REV. PSYCHOL. 799 (2015).

by the courts and has incorporated additional theories to more accurately reflect defendant decision-making. Courts should follow suit and incorporate these nuanced theories and models. Continuing to center individual defendant decision-making in determining prejudice while ignoring the research on that very topic leads to unjust results.

b. Problems with Evidence of Decision-Making in IAC

Because the courts narrow the theories of decision-making that they rely on in IAC cases involving plea bargains by noncitizens, they also narrow the types of evidence that they rely on. This section explores those blind spots in the evidence. Because of the influence of the shadow model, courts often focus on the comparison between the plea-offer sentence and the predicted after-trial sentence. As we argue here, this comparison misses a critical component of real practice—namely, that lawyers regularly negotiate around both deportation and extreme sentences in the same case. Because courts exclude this evidence from the *Lee* analysis, they both likely misinterpret what happened at the plea phase and reaffirm some of the most coercive aspects of plea bargaining.

However, courts are willing to veer away from the shadow model where there are clear contemporaneous statements by the defendant that avoiding deportation was her primary goal in the plea process. But, relying on contemporaneous statements to prove up the defendant's intentions misses all the ways in which the court system regularly silences defendants. Finally, courts entirely ignore the influence of the immigration system on both the defendant and the broader criminal process. Courts treat the two systems as entirely separate when actually a defendant may be concurrently experiencing both processes.

i. Lawyers Negotiate Around Both Negative Immigration and Sentencing Consequences

Courts consistently compare the costs of deportation against the outrageous sentences that defendants receive if they opt for trial instead of a plea bargain, creating a binary that pits the maximum potential sentence against deportation. In this way, courts in the IAC context fail to account for how lawyers regularly negotiate around both long sentences and deportation, often in the same case. By ignoring the real-world lawyering that goes into plea negotiations, courts paint an unrealistic portrait of a defendant's pre-trial options and cement the trial penalty as a bargaining chip during plea negotiations.

The trial penalty can be described as a punishment a defendant faces for exercising her constitutional right to trial.[175] Typically, the trial penalty is

[175] *See* Rick Jones et al., *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It,* NAT'L ASS'N OF CRIMINAL DEFENSE LAWYERS 6

imposed when a defendant proceeds to trial, loses, and then faces an extreme sentence differential between the post-trial sentence and the pre-trial plea offer. The average penalty across crimes is a sentence of 10.8 years for going to trial but only 3.3 years for taking a plea.[176] Although one can frame the penalty as a plea discount,[177] many defendants suffer for exercising a right to trial. As outlined in Part I, the IAC cases involving deportation also highlight the trial penalty. In many of these cases, to determine whether the defendant would have accepted the plea or gone to trial, courts weigh the relatively light sentence attached to the plea offer with the massive sentence the court predicts the defendant will face after trial.[178]

The *Lee* case itself is a prime example of how deportation is pitted against the extreme sentence, or the lack thereof, after trial. The defendant in *Lee* accepted a plea with a sentence of a year and a day in prison.[179] Although the Court did not reference the exact sentence Lee faced after trial, it noted that Lee "balanced" deportation against the chance of "a year or two more of prison time" had he gone to trial.[180] The comment from the majority indicates that Lee, in asking the Court to give him the option of trial, was choosing between a similar sentence to his plea offer or deportation. The majority noted that his "chances at trial were not markedly harsher than pleading."[181]

But the Court's guess as to the post-trial sentence in *Lee* was likely wrong. Lee probably was facing a much worse sentence after trial. His plea agreement included a three-level reduction to his applicable sentencing guidelines and a promise from the government not to object to the "safety valve" limitation on the statutory minimum sentence.[182] Because he pleaded guilty, the district court varied downward—to a year and a day—from the advisory Guidelines range of twenty-four to thirty months.[183] Nevertheless, those benefits, including his advisory Guidelines range, would have been out the window had Lee gone to trial. He could have faced anywhere between zero and twenty years in prison under the statutory sentence range for a

(2018), https://www.nacdl.org/getattachment/95b7f0f5-90df-4f9f-9115-520b3f58036a/the-trial-penalty-the-sixth-amendment-right-to-trial-on-the-verge-of-extinction-and-how-to-save-it.pdf, *archived at* https://perma.cc/5W5H-VPBT [hereinafter *Trial Penalty Report*]. It should be noted that there is some debate about whether the trial penalty should be, instead, viewed as a plea discount. *See generally* Shi Yan & Shawn D. Bushway, *Plea Discounts or Trial Penalties? Making Sense of The Trial-Plea Sentence Disparities*, 35 JUSTICE QUARTERLY (2018); Ben Grunwald, *Distinguishing Plea Discounts and Trial Penalties*, 37 GA. ST. U. L. REV. 261 (2021). In this paper, we adopt the trial penalty language, although we acknowledge that many courts are framing the differential between the plea the defendant accepted and the potential after-trial sentence as a discount or "good deal."

[176] *Trial Penalty Report*, *supra* note 175, at 20.

[177] *See supra* note 175

[178] *See supra* Part I.

[179] Lee v. United States, 137 S. Ct. 1958, 1963 (2017).

[180] *Id.* at 1969.

[181] *Id.*

[182] Brief for the United States in Opposition at 3, Lee v. United States, (No. 16-327), 2016 WL 6892851 at *3 (2016).

[183] *Id.*

conviction for possessing ecstasy with the intent to distribute in violation of 21 U.S.C. 841(a)(1).[184] It is hard to calculate a true counterfactual of what his final sentence would have been after trial given the many moving pieces in federal sentencing, but it is not at all clear that he faced a much more favorable outcome at trial, as the Supreme Court claimed.

This observation—that the Supreme Court got it wrong—is important since the post-trial sentence is a critical data point in the *Lee* analysis, and courts (even the Supreme Court) are often not sure what the sentence after trial will be. The Supreme Court rounded down, but many courts round up, treating even non-mandatory minimum and maximum sentences as the final sentence, even when there is no evidence such a sentence would be the *actual* sentence.

In addition, if courts can be wrong about the post-trial final sentence, then it makes the use of the trial penalty in *Lee* a deeply problematic measure of the rationality of the decision. In the Court's view, the smaller the penalty, the more rational it is for a defendant to take his chances at trial. But the court, through its interpretation of the sentence, can influence the parameters of the defendant's hypothetical choice, which in turn may determine the outcome of the prejudice inquiry. The penalty itself is rationalized and normalized as a bargaining chip, even where it does not reflect the likely sentence the defendant would receive. As the cases in Part I make clear, because courts adopt the "shadow of trial" model, they regularly look to the size of the trial penalty in determining whether a defendant would have accepted the plea. For instance, in the Ohio Supreme Court case of *State v. Bozso*, the court found that the defendant's choice to plead guilty was "rational" because he got such a good deal on his sentence compared to the maximum sentence after trial.[185] However, as the dissent noted, there was a very good chance that Bozso would not have been convicted, let alone have received the full sentencing ramifications of his charges.[186]

But even if we assume courts could correctly predict the post-trial sentence every time, judges' embrace of the trial penalty as just part of the equation should worry us. From a normative perspective, courts should be trying to move away from the trial penalty rather than embracing it. Both scholars and judges have bemoaned the loss of trials.[187] Part of the reason that trials have disappeared is because of the trial penalty. But separate and apart from the loss of trials, the trial penalty is also deeply unfair. Defend-

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[184] At sentencing, courts are permitted to consider relevant conduct that has not been admitted to in a plea agreement or proven to a jury at trial; thus, Lee would have potentially been on the hook for the 303 ecstasy pills the government alleged he sold over the course of forty transactions, and he would have also faced an enhancement for possessing a gun during the transactions. 18 U.S.C. § 3661; U.S.S.G. § 1B1.4.

[185] State v. Bozso, 162 Ohio St.3d 68, 2020-Ohio-3779, 164 N.E. 344, 351, at ¶ 31 (noting that since Bozso faced so many serious charges, and ultimately avoided a prison sentence altogether, the decision to enter a plea rather than go to trial "does not seem irrational").

[186] *Bozso*, 2020-Ohio-3779 at ¶ 59, 164 N.E. 3d at 359 (Donnelly, J., dissenting).

[187] Robert J. Conrad, Jr. & Katy L. Clements, *The Vanishing Criminal Jury Trial: From Trial Judges to Sentencing Judges*, 86 GEO. WASH. L. REV. 99 (2018).

ants often end up with sentences well beyond what even the prosecutor thought was a just outcome for the case. When courts make the trial penalty a normal part of the process, rather than noting both the moral and practical problems with such a penalty, they bolster the penalty. Indeed, it seems hard not to see how a prosecutor, seeing how the courts deal with the trial penalty in deportation cases, would not be inclined to charge a crime with a high mandatory minimum in order to coerce a plea from a noncitizen, who then would be hard pressed to argue in the context of IAC that the choice to take the plea rather than go to trial was rational.

Additionally, these discussions of the trial penalty also often leave out a key feature of actual plea practice, which is that lawyers regularly negotiate around both the trial penalty and deportation during plea negotiations. Noticeably absent from post-*Lee* IAC cases is any indication that there was some outcome for the defendant that did not involve either an outrageous sentence or being deported from the country.[188] In one case, for instance, the court focused on the possible double-digit after-trial sentence in denying the defendant's challenge, even though the prosecutor had agreed to a non-incarceratory sentence.[189] The very fact that so many of these cases revolve around the defendant negotiating a charge so well below the sentence after trial should indicate that such negotiation is both a common and accepted part of plea practice. And indeed, it is. High mandatory minimums are, among other things, means for legislatures to give power to prosecutors during their plea negotiations, but not prescriptions for actual sentences that the legislators intend defendants to receive.[190]

So too, defense attorneys and prosecutors often figure out ways around the deportation consequence.[191] Indeed, even the Supreme Court acknowledged this possibility in *Padilla* when the majority noted explicitly the possibility of negotiating around deportation:

> [I]nformed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties. . . . Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically

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[188] Thea Johnson, *Fictional Pleas*, 94 Ind. L.J. 855, 877 (2019).

[189] Echeverria v. CSSD, No. CV164008035, 2017 WL 3975566, at *13 (Conn. Super. Ct. July 26, 2017).

[190] For a full discussion of the history and use of mandatory minimums as a tool of prosecutorial discretion, *see generally* Thea Johnson, Lying at Plea Bargaining, Ga. St. U. L. Rev. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3868602, *archived at* https://perma.cc/YSL3-5Y6L.

[191] Thea Johnson, *Measuring the Creative Plea Bargain*, 92 Ind. L.J. 901, 930–32 (2017).

> triggers the removal consequence. At the same time, the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does.[192]

And yet, courts often ignore[193] what the majority concedes in *Padilla*, which is that a regular part of the plea process is fashioning bargains that avoid the deportation consequences of a conviction. Indeed, mandatory minimums and deportation are among many consequences that the parties negotiate around in shaping pleas. It is not a given that such negotiation is possible, but it is a regular feature of the plea process that the courts should recognize in making IAC decisions.

As Jenny Roberts argues in her seminal piece, *Effective Plea Bargain Counsel*, the negotiating of the plea itself should be part of a lawyer's obligations under ineffective assistance of counsel jurisprudence.[194] There is no real reason we cannot—and should not—judge the lawyer's performance at plea bargaining as we judge the lawyer's performance at trial.[195] Others, like Cynthia Alkon, have pointed out that if negotiation is a skill we teach in law school, it is also a skill we should assess in practice.[196] While courts may not be ready to embrace a formal evaluation of defense counsel's negotiation practice as part of the performance prong of IAC, it does not mean that such a consideration cannot be included in a totality-of-the-circumstances analysis under the prejudice prong.

As the *Padilla* court acknowledged, deportation may be a *worse* fate for some defendants than the outcome of the criminal case, and this was indeed the case for Padilla, who was facing deportation to a country he had not lived in for many decades. As such, it was much more important to him that he avoid the immigration consequences than the full brunt of the criminal consequences of the conviction. The Court acknowledged that this meant that his attorney should then have tried to negotiate a plea that was respectful of those priorities. However, this recognition has failed to make it into the prejudice jurisprudence that has followed. As a result, these cases paint an unrealistic portrait of the criminal system where a defendant has before him two options—deportation or a huge prison sentence—and must pick his poison. The reality is that a good defense attorney may be able to avoid both outcomes. This should at least be reflected in the IAC analysis.[197] As part of

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[192] Padilla v. Kentucky, 559 U.S. 356, 373 (2010).

[193] With few exceptions, *see, e.g.*, United States v. Murillo, 927 F.3d 808, 817–18 (4th Cir. 2019) (acknowledging that the defense attorney negotiated to omit immigration waivers as part of the plea deal); *see also* Bobadilla v. State, 117 N.E.3d 1272, 1288 n.5 (Ind. 2019) (discussing what could have been negotiated to avoid deportation for defendant).

[194] Jenny Roberts, *Effective Plea Bargain Counsel*, 122 Yale L. J. 2650, 2661-62, 2664 (2013).

[195] *Id.* at 2670–71.

[196] Cynthia Alkon, *Plea Bargaining Negotiations: Defining Competence Beyond Lafler and Frye*, 53 Am. Crim. L. Rev. 377, 385–89 (2016).

[197] Although it is beyond the scope of this paper, this is also an argument for the robust collection of plea data, including other offers made to the defendant and the nature of the

the counterfactual hypothetical, courts should also ask what the lawyer could have done differently vis-à-vis the defendant's decision to plead guilty.[198]

Finally, we should see what this discussion about a defendant's options tells us about the modern criminal system. Courts are essentially asking—which is worse: To be deported or to face a massive sentence after trial that one could avoid through the plea process? That this is the state of things should be cause for alarm, particularly since these outcomes often do not correspond to the seriousness of the charges.

ii. Defendants are Silenced in the Criminal System

What emerges from a review of the post-*Lee* cases is the focus on the defendant's contemporaneous declarations about his goals for the criminal process. Defendants who win their IAC claims—including the defendant in *Lee*—tend to have made clear statements to other people that avoiding deportation was their main goal in the negotiation of the criminal case. This evidence is particularly critical since where a defendant made clear statements of her intent to avoid deportation, courts are more willing to move away from relying on the "shadow of trial" model. Courts find statements particularly reliable if they were made on the record (as they were in *Lee*) but will also look to those statements made outside the courtroom. But—as when the courts merely compare deportation to the trial penalty—this emphasis on contemporaneous statements misses many realities of practice. More importantly, as M. Eve Hanan notes, "[t]hrough silence, criminal legal systems develop narratives, norms and practices with little appreciation for the experiences of people charged with crimes."[199]

Three blind spots regarding defendant speech make the courts' focus on contemporaneous statements particularly problematic. The first is that defendants generally do not speak up in court for various reasons, including that legal culture and practice are designed to exclude defendants' voices from court proceedings and replace them with the voices of their lawyers. Second, defendants' voices are excluded at all phases of a criminal case, particularly when a defendant is accepting a plea. The plea colloquy is generally a rote affair that discourages defendants from expressing confusion or asking questions. Indeed, as courts have acknowledged, the plea colloquy

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negotiations between the parties, which can give courts a more complete picture of the individual pleas and outcomes across pleas in the same courtroom. As Jenia Turner notes in her piece, *Transparency in Plea Bargaining*, this information is often not collected, but should be. *See generally* Jenia I. Turner, *Transparency in Plea Bargaining*, 96 Notre Dame L. Rev. 973, 978–82 (2021).

[198] There are other ways in which attorneys play a critical role in the plea process outside of negotiation and advisement. As Jeffrey Bellin argues in *Attorney Competence in an Age of Plea Bargaining and Econometrics*, at least one study about the effectiveness of defense counsel supports the finding that one way to evaluate attorney competence is by assessing how successful the attorney is at convincing clients to accept favorable deals. Jeffrey Bellin, *Attorney Competence in an Age of Plea Bargaining and Econometrics*, 12 Ohio St. J. Crim. L. 153, 163 (2014).

[199] M. Eve Hanan, *Talking Back in Court*, 96 Wash. L. Rev. 493, 554 (2021).

relies on competent counsel to advise defendants before they ever interact with a judge. For these same reasons, the on-the-record admonishments by judges that courts rely on so heavily in these cases are a poor marker of what the defendant did or did not understand at the time he accepted a plea. Finally, although courts are willing to also look at out-of-court statements that the defendant may have made to lawyers, paralegals, friends, or family, there are many reasons that a defendant—particularly a noncitizen for whom English might not be a first language—would not express their goals or desires to their attorney, paralegals, or anyone else (indeed, as we discuss, defendants are specifically told *not* to speak about their criminal cases to anyone outside of their legal team while their case is ongoing). For all these reasons, a strong emphasis on contemporaneous statements in the post-*Lee* IAC analysis is problematic.

As Alexandra Natapoff observed in her seminal piece on the silencing of defendants in court, defendants are silenced formally—by constitutional doctrines and the rules of procedure[200]—and informally by court culture and sometimes even their own attorneys.[201] This tendency to silence defendants exists even at trial where defendants should, in theory, have an opportunity to speak for themselves.[202] But before trial, defendants are rarely heard from at all. As Malcolm Feely noted in his work on criminal courts, defendants show up in courtrooms and are told to stay silent and not make a peep.[203] When defendants do get an opportunity to speak, it is only with their attor-

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[200] For instance, at trial prosecutors will threaten defendants with perjury charges when they testify in a way that conflicts with the government's case. *See* Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. Rev. 1449, 1459–60 (2005) (noting that under Fed. R. Crim. P. 11(b)(1) it is the government's right to use any statement given under oath against the defendant in a perjury charge). The Federal Rules of Evidence often guide defendants to silence by allowing impeachment by prior conviction. Fed. R. Evid. 609. Indeed, even prior convictions largely unrelated to the defendant's history of truthfulness may be introduced to impeach a defendant if he decides to take the stand, thereby discouraging defendants from testifying even where they have compelling narratives to share with the jury. Anna Roberts, *Conviction by Prior Impeachment*, 96 B.U. L. Rev. 1977, 1978–81, 2036 (2016) (arguing that impeachment through prior convictions is flawed and proposing a statute for states considering abolition of the impeachment rule); *See also* Julia Simon-Kerr, *Credibility by Proxy*, 85 Geo. Wash. L. Rev. 152, 156–58 (2017) (arguing prior conviction evidence relies on the false narrative that those who have been convicted of a previous offense are more likely to lie in the future). This silencing of defendants poses real harm as a practical matter. Empirical evidence demonstrates that juries hold it against defendants when they fail to tell their story during trial, even when they are instructed not to. Jeffrey Bellin, *The Silence Penalty*, 103 Iowa L. Rev. 395, 413 (2018).

[201] But legal culture also encourages defendant silence. Hanan, *supra* note 199, at 554.

[202] As Vida Johnson notes in her work about the silencing of defendants during trial, "despite the fact that defendants are more likely to win should they testify, there are significant ways in which the law discourages their testimony." Vida Johnson, *Silenced by Instruction*, 70 Emory L. J. 309, 337 (2020). As Johnson notes, one of these ways is through a jury instruction that directs jurors to view a defendant's testimony with skepticism. *Id.*

[203] *See generally* Malcolm M. Feeley, *The Process is in the Punishment: Handling Cases in a Lower Criminal Court*, 74 Am. Pol. Sci. Rev. 820 (1980); Matthew Clair, Privilege and Punishment: How Race and Class Matter in Criminal Court 141 (2020) ("[D]efense attorneys felt pressure [from judges] to maintain decorum in the courtroom, which meant they needed to silence clients who spoke up.").

ney, and those interactions can be shockingly brief, sometimes lasting only a few minutes.[204] Even in serious cases, defense attorneys may only speak to their clients for a few hours,[205] and at least some of that time—if not most—is dedicated to the attorney explaining the process, informing the defendant of her options, and then advising the defendant. Therefore, even in those forums where a defendant may have a meaningful opportunity to speak, she will often do more listening than speaking.

Once a defendant has decided to end a case with a guilty plea, the defendant will have to formally enter a guilty plea on the record. But even in these moments, defendants tend not to speak. When defendants plead guilty, they are asked a number of questions by the judge to assess their understanding of the plea deal and the rights they are waiving. Most jurisdictions have the defendants formally waive a series of trial rights on the record. In addition, most states and the federal system have added language to the plea colloquy that requires that the judge accepting the plea ask defendants if they are aware that their plea could have immigration consequences.[206] In most places, this question is asked regardless of the context or crime, but rather as part of the standard set of questions every single defendant will be asked. This means that a U.S.-born citizen pleading guilty to a non-deportable offense will have to acknowledge that the crime she is pleading guilty to may lead to deportation consequences, even though she is not deportable and the crime carries no deportation consequences. We note this to make clear just how rote the plea colloquy process is.

The Supreme Court has held that part of what makes a plea "voluntary" is that the defendant was not promised anything in exchange for pleading guilty, other than the charge and sentence set out on the record.[207] However, defendants are promised all sorts of things, formally and informally, in order to induce their guilty pleas, including promises to drop charges that involve the risks of immigration consequences.[208] This reality was expressly ac-

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[204] Richard A. Oppel Jr. & Jugal K. Patel, *One Lawyer, 194 Felony Cases, and No Time*, N.Y. Times (Jan. 31, 2019), https://www.nytimes.com/interactive/2019/01/31/us/public-defender-case-loads.html, *archived at* https://perma.cc/SK3E-QPN3 (citing Yarls v. Bunton, 231 F. Supp. 3d 128, 137 (M.D. La. 2017)) ("[I]t is clear that the Louisiana legislature is failing miserably at upholding its obligations under *Gideon.* Budget shortages are no excuse to violate the United States Constitution. The legislature must resolve the crises and locate a stable source of funding [for the shortage of public defenders.]")); Postlethwaite & Netterville, *The Louisiana Project: A study of the Louisiana Defender System and Attorney Workload Standards*, The American Bar Association Standing Committee on Legal Aid and Indigent Defendants (Feb. 2017), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_louisiana_project_report.pdf), *archived at* https://perma.cc/U4JX-WTAU [hereinafter *The Louisiana Project*].

[205] *See e.g.*, *The Louisiana Project, supra* note 204, exhibit #2.1 (breaking down how many hours a public defender may work on a case and how many of those minutes will be spent with clients).

[206] See *supra* note 123.

[207] Fed R. Crim. P. R.11(b)(2); United States v. Wright, 43 F.3d 491, 495 (10th Cir. 1994) (finding that if a plea is the "product of prosecutorial threats, misrepresentations, or improper promises," then defendant can challenge it as not knowing and voluntary under *Brady*).

[208] Johnson, *supra* note 188, at 858–59.

knowledged in *Padilla*: "At the same time, the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does."[209]

Nonetheless, a defendant generally cannot admit this sort of agreement on the record. This means that even where defendants understand the immigration consequences of their plea and have expressed their desire to avoid such consequences through the use of a plea, the court still does not understand why or how a defendant made a plea decision based on the colloquy.

In fact, we argue it would be fair to say that, although courts rely on the plea colloquy to inform IAC claims, the plea colloquy provides almost no useful information about the defendant's knowledge about the plea or decision-making process, except that the defendant was present for her plea. This is because the plea colloquy is not a meaningful metric for assessing the defendant's understanding at the time of the plea. Defendants are generally not asked meaningful questions but rather questions that require a yes or no answer. And they are often coached on what answers to give.[210] Occasionally, a defendant's lack of understanding about the plea may slip onto the record—as it did on *Lee*.[211] But, as we see in *Lee*, the defendant and his lawyer had an off-the-record conversation where the lawyer, rather than take seriously his client's concern and do additional research, just encouraged him to proceed with the plea.[212] For all these reasons, it is wrong to rely on the colloquy to determine, as many courts do, that the defendant was not prejudiced by her lawyer's incompetent counsel.[213]

It is also unlikely that defendants will make statements that provide insight into their decision-making during off-the-record conversations, even with their attorneys. To begin with, defendants generally have limited time with their defense attorneys. Although defense counsel has an obligation to inquire about the defendant's immigration status during counseling, it does not necessarily follow that the defendant will share that she is not a citizen or what her unique priorities are. This is particularly true if the defendant does not understand that the criminal conviction may lead to deportation; but may even be true where the defendant is correctly counseled about the risks of the conviction.

Defendants, after all, are generally not the drivers of the attorney-client conversation. Rather, it is the lawyer who leads the conversation and mostly

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[209] Padilla v. Kentucky, 559 U.S. 356, 373 (2010).

[210] Michael P. Donnelly, *Truth and Consequences: Making the Case for Transparency and Reform in the Plea Negotiation Process*, 17 Ohio St. J. on Crim. L. 423, 427 (2020).

[211] Lee v. United States, 137 S. Ct. 1958, 1968 (2017).

[212] *Id.* at 1963.

[213] Indeed, the use of colloquies to defeat ineffective assistance of counsel claims has been a problem since the *Padilla* decision came down. As Danielle Lang argues in *Padilla v. Kentucky: The Effect of Plea Colloquy Warnings on Defendant's Ability to Bring Successful Padilla Claims*, 121 Yale L. J. 944, 948–49 (2012), courts were wrongly "conflat[ing] the role of the court in Fifth Amendment plea colloquies and the role of counsel under the Sixth Amendment" by using the judge's warnings at the plea colloquy to limit the scope of *Padilla*.

defendants answer questions that are responsive to the lawyer's focus. If the lawyer only focuses on advising the defendant and not on ferreting out the defendant's wishes, there is no reason to believe that most defendants will offer it up themselves.[214] This is especially true given the empirical information we know about the attorney-client relationship, which can often be fraught.[215] As Alexis Hoag notes, "[d]ifferences in race, ethnicity, and culture between counsel and the defendant can create barriers to relationship building, communication, and trust formation."[216] This is particularly true where the defendant may not communicate easily with the lawyer in a common language. Defendants using translators to speak to their lawyers and the courts are reliant on those translators to communicate their desires and goals. This can be a hit or miss proposition.

Further, even if the defendant does share her priorities with her lawyer, the IAC inquiry relies on the lawyer's memories of the encounter to corroborate the defendant's contemporaneous statements. There is often no formal recording of these conversations, so a lawyer has only her own memory and notes to recall these conversations. If the lawyer fails to either remember or record a conversation with the client, any statements made to the lawyer will be lost for the purposes of an IAC inquiry, especially since courts are so distrustful of a defendant's own recollections of events.

Finally, the reliance on the defendant's contemporaneous statements to others is particularly unusual given that defendants are typically advised only to speak to their lawyers about the case. Indeed, any lawyer worth her salt will implore a defendant not to speak to anyone outside the legal team about the criminal case. So, if the defendant does not feel comfortable or simply does not understand the need to express to the lawyer the importance of immigration consequences, the chances that they will express these sentiments to anyone else is low.

Because of all the challenges to defendants voicing their priorities either in or out of court, the reliance on proof of contemporaneous statements to others is problematic and fails to consider the reality of the criminal court experience for noncitizens.

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[214] Some lawyers, of course, do explicitly try to draw out their clients' priorities. For instance, in interviews with defense attorneys for a prior piece, one of the authors found that some lawyers specifically focus on the client's wishes. Johnson, *supra* note 191, at 922 (quoting a lawyer as explaining, "'I always ask my clients: What is your goal here? If your goal here is to say I didn't do anything wrong and I want to prove that, then you want to go to trial. If your goal here is to, let's say, preserve your job, then that might be finding a plea that best works with your job. If your goal here is preserve your driver's license, then that might be a different plea. If your goal is to preserve your immigration status that might be a different plea. So prioritize for me – what is your goal? And from there we can work on what works best for you.'").

[215] Clair, *supra* note 203.

[216] Alexis Hoag, *Black on Black Representation*, 96 N.Y.U. L. Rev. 1493, 1534–38 (2021) (reviewing literature on barriers to formation of trust in attorney-client relationships).

iii. Immigration Detention Impacts the Criminal Case

The final reality not reflected in *Lee* and the cases applying *Lee* is how immigration consequences actually play out for defendants facing criminal charges. First, the Court often speaks about immigration consequences as though they occur only *after* a defendant is convicted and has served her sentence, but the reality is that immigration consequences often occur much earlier in the process, sometimes as early as at arrest. The criminal process and the immigration removal process, including detention, often occur simultaneously, and each process impacts the other. For instance, the criminal charges determine the type of immigration consequences the defendant faces, and those consequences in turn often affect the nature of the plea deal on the table.[217] This undoubtedly impacts how a noncitizen defendant decides whether to accept or reject a plea offer. Second, the *Lee* Court omitted from its evidentiary review a key fact demonstrating Lee's commitment to avoiding deportation: Lee willingly spent more than seven years in immigration detention as his appeal worked its way through the court system.[218] But neither the Supreme Court nor lower courts consider evidence of whether the defendant continued to fight removal from inside immigration detention.

Lee focused on the immigration consequence of deportation following the completion of the defendant's sentence. But, as Lee realized,[219] the process of being deported begins well before then and often involves more than the act of deportation itself. As the New York Court of Appeals has noted, the penalty of deportation consists of "additional detention, followed by the often-greater toll of separation from friends, family, home, and livelihood by actual forced removal from the country and return to a land to which that person may have no significant ties," emphasizing that detention "closely resembles criminal incarceration" and "may last several days, or it may last months or years."[220] As the court further noted, "[t]he deportation process deprives the defendant of an exceptional degree of physical liberty by first detaining and then forcibly removing the defendant from the country."[221] The immigration consequence of deportation necessarily includes detention.

Under the Immigration and Nationality Act (INA), the Attorney General is granted the authority under a variety of circumstances to detain noncitizens, including noncitizens deemed "criminal aliens"[222] and noncitizens

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[217] Eisha Jain, *Jailhouse Immigration Screening*, 70 Duke L. J. 1703, 1725–26 (2021).

[218] United States v. Lee, 2013 U.S. Dist. LEXIS 186239, at *1–4 (W.D. Tenn. 2013), *aff'd*, 825 F. 3d 311 (CA6 2016), *rev'd*, 137 S. Ct. 1958 (2017).

[219] Lee only learned that he would be deported when he "learned that the correctional facility where he was confined 'exclusively housed federal inmates' facing deportation after completing their sentences." Lee learned from a case manager that "removal proceedings were imminent." Brief for Petitioner at *9, *Lee*, 137 S. Ct. 195 (No. 16-327).

[220] People v. Suazo, 118 N.E.3d 168, 176 (N.Y. 2018).

[221] *Id.*

[222] 8 U.S.C. § 1226(c). While statutes and opinions often use the term "alien," we refer to individuals with the more neutral term "noncitizens" unless directly quoting a source. *See generally* D. Carolina Núñez, *War of the Words: Aliens, Immigrants, Citizens, and the Language of Exclusion*, 2013 B.Y.U. L. Rev. 1517 (2013) (concluding that "'alien' is significantly

ordered removed from the United States.[223] Noncitizen defendants may be detained during both the pre- and post-criminal trial periods. These periods of detention do not only occur after a noncitizen defendant has been convicted and has served her sentence; a noncitizen defendant may be detained even before arraignment. So-called "jailhouse immigration screening" programs like Secure Communities,[224] Criminal Alien Program ("CAP"),[225] and the Section 287(g) Program[226] facilitate the sharing of information between state and local law enforcement agencies and ICE. These programs have led to ICE "pick[ing] up far more people from prisons and jails than from all other settings combined"[227] by alerting ICE of the arrest of an individual suspected of being eligible for removal.

Additionally, these programs "have cascading and immediate consequences in the criminal justice system, such as the denial of bail and harsher plea offers."[228] As Eisha Jain detailed, not only may the fact of arrest lead to immigration consequences, but those immigration consequences may lead to more severe criminal consequences, which then lead to worse immigration consequences.[229] For example, a noncitizen is arrested and charged with theft. The jail participates in an immigration screening program, and the noncitizen becomes subject to an ICE detainer. The fact of this detainer leads to a harsher, even if minimally so, plea offer. The noncitizen accepts the plea deal and is sentenced to one year. The noncitizen is now deportable

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associated with criminality, invasion, and otherness"). Indeed, the Biden administration has decided to no longer use the term "alien" in this context. Michael D. Shear, *The Words That Are In and Out With the Biden Administration*, N.Y. Times (Mar. 18, 2021), https://www.nytimes.com/2021/02/24/us/politics/language-government-biden-trump.html, *archived at* https://perma.cc/2454-5QYC.

[223] 8 U.S.C. § 1231(a)(2).

[224] Secure Communities was revived under the Trump Administration and subsequently discontinued under the Biden Administration in January 2021. *See Secure Communities*, https://www.ice.gov/secure-communities (last visited Mar. 13, 2022), *archived at* https://perma.cc/Z4BN-N599.

[225] *Criminal Alien Program*, U.S. Immigration and Customs Enforcement, https://www.ice.gov/identify-and-arrest/criminal-alien-program (last visited Mar. 13, 2022), *archived at https://perma.cc/F2ZF-ZCMQ*. The CAP Program allows state and local law enforcement to submit fingerprints of individuals taken during the criminal booking process to the FBI and, if the individual has previously had encounters with immigration enforcement, ICE will be alerted to their detention.

[226] *Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. Immigration and Customs Enforcement, https://www.ice.gov/identify-and-arrest/287g (last visited Mar. 13, 2022), *archived at https://perma.cc/GAV8-K484*. The 287(g) Program "allows state and local officers to act as a force multiplier in the identification, arrest, and service of warrants and detainers of incarcerated foreign-born individuals with criminal charges or convictions." *Id.*

[227] Jain, *supra* note 217, at 1704.

[228] *Id.* at 1725.

[229] "Some local law enforcement agencies appropriate immigration detainers as formal 'markers' that affect how they process criminal cases. Sociologists have conceptualized the mark of a criminal record as a form of 'public credentialing.' The mark of a prior criminal conviction, for instance, leads to systemically harsher plea bargains for recidivists. Immigration detainers also serve as markers that formally affect dispositions and bail. They impose enormous costs on arrested individuals who have not been convicted of any crime." Jain, *supra* note 217, at 1725.

because a theft conviction with a one-year sentence is an "aggravated felony" under immigration law. If the noncitizen defendant had been offered a plea carrying a maximum sentence of 364 days instead of 365, it would not have been a deportable theft offense. In immigration law, accepting even a minimally harsher plea offer can lead to drastically different immigration consequences.

Appellate courts treat the two systems as occurring consecutively when they are inextricably intertwined. The Court has failed to account for the nature of the concurrent processes in its assessment of prejudice, leaving aside the way the immigration matter may be affecting the plea offer on the table, the stakeholders' view of that plea offer, and the defendant's decision to accept or reject it.

Another reality that tends to be excluded from these cases is how immigration detention may impact the defendant's decision-making. From the outset, it is important to make clear that further research is needed in this area to understand how immigration detention impacts a defendant's decision in his criminal case, but we have some clues from other areas of research that indicate that detention is likely to influence a defendant's view of a plea.[230]

For instance, where a defendant is in immigration detention at the time he accepts a plea, courts might look at the research on pre-trial criminal detention. In the same ways that pre-trial criminal detention may impact the decision to accept or reject a plea, pre-trial immigration detention may also impact the decision. As previously discussed in Part II.a., recent studies have suggested that pre-trial criminal detention leads to an increased acceptance of guilty pleas. Temporal discounting leads defendants to overvalue the immediate "reward" of getting out of pre-trial detention by accepting the plea while undervaluing the subsequent consequences of that decision. This may play out differently for noncitizen defendants, who may be tempted to accept a plea and/or stipulate to their own removal to avoid what may be a years-long process resulting in their deportation. On the other hand, a noncitizen defendant may be willing to tolerate prolonged periods of detention, as Lee did, if there is the possibility of avoiding deportation in the future.

More likely, though, is the fact that the defendant will face subsequent immigration detention, a fact that was ignored by *Lee*. The Court made clear that a defendant will "obviously" compare the sentence they receive by pleading with the likely sentence at trial, but the Court did not account for the added time for mandatory detention pursuant to 8 U.S.C. §§ 1226(c) and 1231(a).[231] For a noncitizen defendant, the prospect of a lengthy sentence

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[230] As we note in the Conclusion, one fruitful area of research where we would direct scholars is exploration of how noncitizens make plea decisions with an emphasis on field studies with noncitizens who currently and in the past faced criminal charges.

[231] For those noncitizen defendants who accept a guilty plea or are convicted at trial, their detention is mandated pursuant to 8 U.S.C. § 1226(c). Following a criminal sentence, the noncitizen defendant will be turned over to ICE for immigration detention during the pendency of their removal proceedings. If such proceedings have occurred during the time in which the defendant served her criminal sentence, the defendant will be held in anticipation of removal pursuant to Section 1231(a). Notably, Section 1226(c) does not statutorily provide for bond

followed by mandatory detention in an equally restrictive facility may encourage that defendant to take her chances at trial regardless of how poor those chances seem.

The *Lee* Court focused on the act of deportation and failed to consider the reality that noncitizen defendants face a lengthy process that involves not only the removal itself but also detention. In doing so, the Court has omitted key considerations that likely factor into a noncitizen defendant's decision to accept a plea or to take her chances at trial.

The *Lee* Court also failed to consider key evidence of the strength of Lee's commitment to avoiding deportation. A review of the brief submitted by Lee to the Supreme Court reveals that

> Mr. Lee has willingly spent *more than seven years* in detention awaiting the outcome of this litigation, rather than allowing himself to be deported after serving his one-year sentence. This fact alone is strong objective evidence that avoiding deportation is of greater concern to Mr. Lee than the possibility of serving a significantly longer prison sentence.[232]

While the Court concluded that Lee demonstrated a reasonable possibility that he would have rejected the plea, the *Lee* decision does not mention the amount of time he willingly spent in detention awaiting the outcome of his appeal. Instead, the Court cited Lee's repeated questions to his attorney of the risk of deportation, Lee's various connections to the United States and the length of time he had lived here, his lack of connections to South Korea, and his response to the judge during the plea colloquy.[233] While these facts certainly suggest that Lee placed "paramount importance" on avoiding deportation, the strongest objective evidence was his willingness to remain in detention for more than seven years, much longer than the year and one day prison sentence he actually served and longer than the prison sentence he would have served had he been convicted at trial. Lee's submission to such a

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hearings for those detainees. In *Demore v. Kim*, the Supreme Court examined whether Section 1226(c) and its denial of bond hearings for those detained under its authority violated procedural Due Process and concluded that there was no violation. The Court relied on the assumption that detention is, on average, for just a brief period. 538 U.S. 510, 1720 (2003) (internal citations and quotation marks omitted) ("Under § 1226(c), not only does detention have a definite termination point, in the majority of cases it lasts for less than the 90 days we considered presumptively valid in *Zadvydas*. The Executive Office for Immigration Review has calculated that, in 85% of the cases in which aliens are detained pursuant to § 1226(c), removal proceedings are completed in an average time of 47 days and a median of 30 days. In the remaining 15% of cases, in which the alien appeals the decision of the Immigration Judge to the Board of Immigration Appeals, appeal takes an average of four months, with a median time that is slightly shorter"). While this may or may not have been accurate at the time of the *Demore* decision, now nearly twenty years later, the assumption is questionable, at best. *See* Jennings v. Rodriguez, 138 S. Ct. 830, 860 (2018) ("[D]etention is often lengthy. The classes before us consist of people who were detained for at least six months and on average one year."); *see also* ACLU*, Prolonged Detention Fact Sheet*, https://www.aclu.org/sites/default/files/assets/prolonged_detention_fact_sheet.pdf, *archived at https://perma.cc/345B-87VS*.

[232] Brief for Petitioner at *4, Lee, 137 S. Ct. 1958 (No. 16-327).

[233] Lee v. United States*,* 137 S. Ct. 1958, 1968 (2017).

lengthy detention period is the embodiment of the Court's recognition "that preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence" and yet the Court makes no mention of it.

The Court instead directs lower courts to "not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences."[234] This emphasis on contemporaneous evidence may be why the Court chose not to include Lee's post-sentence detention in its consideration of the evidence, but this decision not to consider it disadvantages noncitizen defendants by ignoring some of the strongest objective evidence they can offer.

The *Lee* decision ignores the realities that noncitizen defendants face as they navigate the intersections of the criminal and immigration systems. The Court failed to consider the entire removal process and how it impacts decision-making and omitted key objective evidence of a defendant's commitment to avoiding deportation.[235] In doing so, the Court established a test for prejudice that is divorced from the realities of the crimmigration system.

III. The Path Forward

We critique the Court's analysis of IAC claims involving deportation, but this Article aims to do more than merely criticize the process; it provides a path forward for the Supreme Court and lower courts to create a more precise and more just process in this area of IAC.

This Part starts from the premise that deportation is a grave outcome that can destroy a person's life. As many courts have acknowledged, deportation is frequently a worse fate than a prison sentence.[236] In addition, courts must recognize that the criminal defense attorney plays a critical role not only in the defendant's criminal case but also in their immigration case. A defendant has no Sixth Amendment guarantee to a lawyer in immigration matters and is, therefore, unlikely to have an attorney in immigration court. What flows from recognizing these two points—that deportation is life altering and it is the criminal defense attorney who may be the only barrier between a defendant and future deportation—is a series of presumptions and baselines that we encourage courts to adopt.

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[234] *Id.* at 1967.

[235] It is difficult to find IAC appellate cases that consider either the impact of deportation detention on the defendant's decision to plead guilty or the fact that the defendant might have spent significant time in removal proceedings to fight the criminal conviction. *But see* People v. Camacho, 32 Cal. App. 5th 998, 1009–10 (Cal. Ct. App. 2019) (introducing findings from California legislature about the negative aspects of removal proceedings: prospect of immigration detention, loss of right to court-appointed counsel, among other realities of being placed in immigration proceedings).

[236] Padilla v. Kentucky, 559 U.S. 356, 365, 368 (2010).

First, and most importantly, this Article proposes that courts presume prejudice where a defendant has not been advised that she faces deportation from the country and then does indeed face such a prospect. In these cases, there is no question that the attorney has violated the duty to inform under *Padilla*. Because deportation is such a calamitous outcome, courts should treat the resolution of the performance prong in the defendant's favor as creating a presumption that the defendant was prejudiced. Facing deportation does not necessarily mean that the defendant is imminently to be deported (although, of course, that would qualify). Rather, the term covers a range of possible situations, including that the defendant has been served with a notice to appear before immigration authorities, is permanently inadmissible, or is mandatorily deportable even if there are potential avenues of relief in the immigration system. Since the outcomes in the immigration system are so variable, "facing deportation" should be construed broadly.

Second, whether courts adopt such a presumption, they should expand the scope of evidence they consider during the prejudice inquiry to include information that more accurately reflects how noncitizen defendants actually make decisions in the criminal system.

To begin, we encourage courts to adopt the following test: in order to prevail on the prejudice prong of an IAC claim, the defendant must first make a prima facie case showing that 1) she was not informed of the immigration consequences of her plea (this, of course, is already part of the performance inquiry), 2) had she been informed, she would have made a different choice, and 3) she faces deportation (as defined above). Once she makes this prima facie showing, it creates a rebuttable presumption that she has been prejudiced by her lawyer's poor advice. The state may then overcome this burden by proving by clear and convincing evidence that the defendant would have accepted the initial plea even with correct information about the plea consequences.

This test makes sense for several reasons. It places the burden on the defendant to produce certain initial evidence that is likely to be in the defendant's possession and relevant to a claim of prejudice.[237] For instance, the defendant would have to provide some evidence—either by producing evidence of contemporaneous statements or through sworn affidavits—that demonstrate she would have made a different choice. The defendant only needs to make a prima facie case at this initial stage, ensuring some gatekeeping while not making the gate so high that defendants cannot get over it.

Once the defendant has made a prima facie case showing these three elements, a rebuttable presumption would be established that the defendant was prejudiced by her lawyer's poor advice. This presumption would then switch the burden to the state, who could rebut it by showing by clear and convincing evidence that the defendant would have made the same choice to

[237] Beth Colgan, *The Burdens of the Excessive Fines Clause*, 63 Wm. & Mary L. Rev. L. Rev. 407, 461–64 (2021).

accept the plea even with the correct information about the deportation consequences. The clear and convincing standard is appropriate because it reflects the seriousness of the inquiry and the deprivation that defendants face (i.e., banishment from the country) if they lose their IAC claim. The Supreme Court has selected the clear and convincing standard for other similarly serious deprivations, like denaturalization[238] and the termination of parental rights.[239]

Such burden shifting is a common element of the Court's criminal procedure jurisprudence. For instance, in the context of a *Batson* challenge, the burden shifts between the defendant and the state several times during the relevant inquiry.[240] In addition, courts already apply such presumptions in the IAC context. As Eve Brensike Primus notes, in a series of cases about defense counsel's failure to investigate before a capital sentencing hearing, the Supreme Court "seem[ed] to recognize a rebuttable presumption of deficient performance."[241] Further, where there is "pervasive" personal ineffectiveness—defined by Primus as a "breakdown in the adversarial process"—prejudice is presumed.[242] For example, in a case where the trial court refused to appoint separate counsel for defendants with contradictory defenses, the Supreme Court presumed prejudice based on the clear conflict of interest of counsel. Although this new standard would be a deviation from the current IAC rule in plea cases, the Court has already carved out a special rule under *Padilla* for pleas that implicate deportation in the performance space; there is no reason there cannot be special rules for the prejudice question as well.[243]

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[238] Schneiderman v. United States, 320 U.S. 118, 136 (1943).

[239] Santosky v. Kramer, 455 U.S. 745, 747–48 (1982). For other arguments on the need for a clear and convincing standard in cases involving serious consequences to the defendant, Beth Colgan, *supra* note 237, at 468–74.

[240] *See* Batson v. Kentucky, 476 U.S. 79, 1721–23 (1986) (finding defendant bears burden to show discrimination during jury selection and, after prima facie case has been made, prosecutor must then rebut this presumption by showing that racially neutral criteria was used to select the jury).

[241] Primus, *supra* note 34, at 1635.

[242] *Id.* at 1643. In addition to an openness to presumptions that work in defendant's favor, more recently the Court might also be moving away from a stringent outcome-based test for prejudice towards a more expansive vision of prejudice that focuses on whether the violation rendered the trial 'fundamentally unfair." *See* Eve Brensike Primus & Justin Murray, *Redefining* Strickland *Prejudice After* Weaver v. Massachusetts, HARV. L. REV. BLOG (May 22, 2018), https://blog.harvardlawreview.org/redefining-strickland-prejudice-after-weaver-v-massachusetts/, *archived at https://perma.cc/43N4-WLNP*. We would argue, of course, that this broader vision should apply to cases resolved through plea bargaining, as well as trial.

[243] While we hope the Supreme Court will take up our proposal, state and federal courts also have the power to enact a presumption by interpreting *Lee* to include a presumption. Further, state constitutions often express similar guarantees as the U.S. Constitution, including the right to competent counsel. *See, e.g.*, N.Y. CONST. art. I, § 6. And state high courts may interpret those state constitutions to be more protective than the U.S. Constitution. This is the case in New York, which has adopted a "meaningful representation" standard for ineffective assistance of counsel that offers more protection than *Strickland* "since even in the absence of a reasonable probability of a different outcome, inadequate counsel will still warrant a reversal whenever a defendant is deprived of a fair trial." People v. Honghirun, 29 N.Y.3d 284, 289 (2017) (citation omitted); People v. Baldi, 54 N.Y.2d 137 (1981). Further, even if courts do not

Prosecutors would likely argue that it will be impossible for them to make arguments about what a defendant would have done at the time of the plea, especially considering what are likely statements by the defendant at the time of the IAC claim that she would have made a different choice with different evidence. But, right now, courts mostly rely on information available to both parties (e.g., statements by the defendant on the record and the nature of the plea deal itself). A prosecutor cannot force a defendant to waive attorney-client privilege about private statements made between the defendant and attorney, but the prosecutor could investigate any other communication by the defendant that was not subject to privilege. The prosecutor can also marshal other relevant evidence. For example, perhaps the defendant had only been in the country for a few months and made clear statements to others that her goal was to finish her criminal case quickly. In addition, the prosecutor can draw from or poke holes in any evidence provided by the defendant during the initial phase of the inquiry.

Further, it is not out of the ordinary for the Court to ask one party to prove what the other party might have done. In other IAC contexts, the Court asks the defendant to prove what the prosecutor and judge would have done in light of different evidence. For instance, the test laid out in *Lafler v. Cooper* and *Missouri v. Frye* requires the defendant to show that the prosecutor or judge would have allowed the defendant to accept the initial plea offer if she had decided to take it hypothetically.[244]

We see our proposal as a modest one that would alleviate some of the injustice produced by the current system, but we also recognize that it does not go far enough in many ways. As others have contended, the prejudice prong is irreparably broken. Justin Murray, for instance, powerfully argues that in the context of ineffective assistance of counsel, prejudice should only be considered when a defendant seeks a new trial as a remedy for a lawyer's poor performance.[245] Murray would also redefine prejudice, moving away from the results-based test currently in place to what he calls contextual harmless error review, a process that would require courts to identify a particular interest protected by the criminal procedure rule at issue and then "examine whether the error harmed the interest identified . . . to a degree substantial enough to justify reversal."[246] We agree with Murray that an overhaul of the IAC test is necessary.[247]

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formally adopt a legal presumption, as we note above, other scholars have observed areas within IAC jurisprudence where there seems to be an unspoken presumption. *See* Primus & Murray, *supra* note 242. Although an informal presumption would not be ideal, it remains an option where formal solutions from high courts are not forthcoming.

[244] Lafler v. Cooper, 566 U.S. 156, 164 (2012); Missouri v. Frye, 566 U.S. 134, 136 (2012).

[245] Murray, *supra* note 20, at 319.

[246] *Id.* at 323–24 (citation omitted).

[247] We note that others have called for the prejudice prong to be eliminated entirely. *See, e.g.*, Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement*, 75 NEB. L. REV. 425, 473–74 (1996) (arguing for the elimination of the prejudice requirement where counsel was asleep or mentally impaired); Kenneth Williams, *Does Strickland Prejudice Defendants on*

Further, there is a strong argument that the inquiry about whether the defendant understood the deportation consequences of a plea should be considered part of the analysis of whether the right to trial was waived knowingly and voluntarily, rather than as an IAC matter. A defendant who does not understand she may be deported from the country can hardly be said to have given up her trial rights "knowingly," separate and apart from the performance of her attorney. And indeed, as we show in Part II.a.ii., a defendant's knowledge of immigration and other collateral consequences is likely to change the plea decision-making process. But the Supreme Court has shown little appetite to expand the scope of knowledge and voluntariness in this context. For this reason, while more robust responses to the problem deserve attention, we think a presumption is a good first step towards broader reform.

We also understand that there may be resistance even to our suggestion of a presumption. For that reason, we have a second proposal that courts can put in place right now. Because the *Lee* factors are not exhaustive, they open the door for courts to consider a range of evidence that relates to decision-making. Unfortunately, the *Lee* factors have become a boundary rather than a starting point. We propose that courts expand the understanding of decision-making currently at play in the jurisprudence. This expansion includes both embracing more realistic decision-making theories and using better decision-making evidence that corresponds to those theories. This also has the benefit of more explicitly using the IAC process to remedy a plea that was not accepted knowingly.

To begin, courts must assess IAC claims by looking at the circumstances unique to the defendant, including relevant information about how the defendant made the decision to plead guilty. This assessment would require courts to familiarize themselves with other theories of decision-making, which would help courts understand the nature of plea bargaining and many other areas of the law.[248] Courts often apply tests involving non-exhaustive factors. In the same way, courts could consider multiple decision-making theories, applying those which make sense within the context of the case. As more research is conducted on defendant decision-making, and particularly noncitizen defendant decision-making, the need to rely on multiple theories may decrease. But until then, courts must familiarize themselves with the research currently available. A greater understanding of the theories of decision-making will help courts determine what evidence is most important for the prejudice analysis given the circumstances of a particular defendant.

Death Row?, 43 U. RICH. L. REV. 1459, 1461 (2009) (contending that the prejudice prong "needs to be eliminated rather than re-tooled").

[248] For instance, the law on informed consent in the civil context also requires courts to suss out the decision-making of the plaintiff. *See, e.g.*, Canterbury v. Spence, 464 F.2d 772, 786–87 (D.C. Cir. 1972) ("Thus the test for determining whether a particular peril must be divulged is its materiality to the patient's decision: all risks potentially affecting the decision must be unmasked.").

Importantly, this involves taking seriously what the client says at the time of the IAC claim. For the reasons explained in Part II.B., there are many reasons why relying on contemporaneous statements will not fully account for the defendant's decision-making. Instead, courts must consider what the defendant recounts about her decision in later affidavits or testimony. Although there is some risk of that testimony being self-serving, defendants give these statements under oath, which comes with it an indicium of reliability. Furthermore, courts should trust a defendant's statements that she would not have accepted the plea if she had known about the potential for deportation, because where a defendant has gotten a terrific deal, a successful IAC claim puts that deal in jeopardy. Even if a defendant wins an IAC claim and eventually goes to trial on the matter, they may then face the full force of the mandatory sentence. As Carlie Malone argued in calling for courts to require lawyers to advise defendants of collateral consequences under *Strickland*, "[i]ndividuals who would have accepted the plea bargain with full information about collateral consequences in the first instance should not be expected to seek a trial, but those who would have rejected the plea offer given full information will be given their opportunity for trial."[249] The same goes for knowledge of immigration consequences. If a defendant would have proceeded to trial with full knowledge of immigration consequences, then she should have the opportunity for that trial. Making the changes we propose will not open the litigation floodgates because there is no automatic windfall for successful defendants.

Courts should also acknowledge the realities of plea practice, which includes understanding how plea bargaining actually works and focusing on the real players in a plea: the lawyers and the judge. Too much of the current IAC inquiry focuses on the defendant's role and some hypothetical outcome after trial, when courts should instead scour the record for information about the attorneys' performance and the role of the judge during the process. For instance, courts should consider evidence of pre-plea preparation by the defense attorney. As part of the prejudice analysis, they should ask whether the defense attorney understood that the defendant could be deported. Of course, this inquiry will be critical to the performance prong, but it also helps unearth whether an unprepared lawyer prejudiced the defendant. In addition, did the lawyer do anything to assess the defendant's priorities? Did the lawyer consult with an immigration attorney? These questions will give the court a sense of whether the lawyer even attempted to mitigate any deportation consequences.

Courts should also turn their attention to the actual negotiation of the case. Courts have been generally loath to evaluate how a lawyer negotiated a case for the performance analysis, focusing instead only on whether the lawyer advised the client of certain critical rights or risks.[250] Putting aside any

[249] Malone, *supra* note 172, at 1200–01.

[250] *See* Padilla v. Kentucky, 559 U.S. 356, 373 (2010) (holding that counsel must inform their noncitizen client that a plea might result in deportation); Lafler v. Cooper, 566 U.S. 156,

debates about whether negotiation skills can be assessed as to the performance prong, we argue that courts should consider a lawyer's performance when analyzing the prejudice prong. Courts should ask, did the lawyer engage in any actual plea negotiation that would avoid the worst potential outcomes in both the criminal and immigration realms? A lawyer who engages in no real negotiation of the case is unlikely to have served as an advocate for their client.[251] On the other hand, a defendant might have a weaker claim if the lawyer negotiated "creatively," as *Padilla* suggests, because there would be less evidence showing the defendant could have escaped the ultimate outcome.

Of course, there are challenges to uncovering an accurate record of how and why the case was negotiated pre-plea. This is partly because there is almost no written record of this phase of the criminal proceeding. But with their client's permission, defense attorneys frequently testify in IAC hearings about what sort of work they did on the case. There is no reason that attorneys cannot also testify about their attempts to negotiate a positive outcome for the client that accounts for both the sentencing and immigration outcomes. In addition, making this inquiry part of the IAC case may encourage lawyers to keep better written records, even informally, of their conversations with clients and the details of the plea negotiation.

Post-conviction courts should also look at the actions of lower court judges during the plea colloquy. Did the judge ask the defendant any questions to assess whether she understood the risk of deportation? Did these questions indicate that the judge investigated this particular defendant's decision and went beyond a rote recitation of the typical plea colloquy questions? If not, then the on-the-record admonishments to the defendant and any answers provided by the defendant in response to those admonishments should carry little weight.

Finally, courts should be more mindful about how immigration detention impacts the criminal process, and they should pay particular attention to what happened once a defendant entered immigration detention. For instance, did the defendant—like Lee—spend years in immigration detention fighting deportation? If so, that is robust evidence that deportation was the primary concern for the defendant and should weigh heavily in the defendant's favor.

Courts must also consider how post-conviction immigration detention may affect the defendant's ability to gather and present certain evidence. For

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165 (2012) ("The constitutional guarantee applies to pretrial critical stages that are part of the whole course of a criminal proceeding, a proceeding in which defendants cannot be presumed to make critical decisions without counsel's advice").

[251] In some cases, the inquiry into whether the lawyer negotiated or should have negotiated a plea does not require a thorough examination. As previously discussed and as pointed out by the court in *Bobadilla*, certain crimes become deportable offenses when they result in a sentence of a year or more. *See* Bobadilla v. State, 117 N.E.3d 1272, 1288 n.5 (Ind. 2019). If the noncitizen defendant was sentenced to a year, subjecting her to mandatory detention, the analysis seems clear: the lawyer should have negotiated it down to 364 days to avoid deportation.

example, in *Bozso*, the court admonished the defendant for not presenting any contemporaneous evidence to support his contention that his paramount concern was avoiding deportation.[252] But Bozso was in immigration detention at the time of the hearing, and his lawyer admitted to not seeking leave to have him brought to the hearing.[253] The lawyer then could not testify about their conversations because Bozso was not present to waive attorney-client privilege and had not done so beforehand.[254] Rather than viewing this as a defendant "forfeit[ing] the opportunity to present the evidence most likely to support (or contradict) his claim," courts must consider the realities of seeking post-conviction relief while subject to immigration detention.[255] Similarly, courts should consider whether the defendant was subject to immigration detention prior to entering a plea. If so, detention may have factored into the offered plea and may have impacted the defendant's decision to accept the plea.

More broadly, if a noncitizen defendant was subject to immigration detention at any point during the criminal process, the court should consider whether the defendant had sufficient access to counsel, to the court, and to evidence. Detention involves deprivation of personal liberty and undoubtedly impacts a defendant's ability to prove prejudice in an IAC claim. The court must account for this reality in evaluating the evidence provided. If courts adopt a more robust analysis in IAC cases, it will hopefully push lawyers and lower courts to affirmatively establish that the defendant understood the consequences of the plea and therefore made a knowledgeable decision.

Conclusion: The Need for Further Research

While social science has made great strides in recent years in understanding defendant decision-making processes generally, targeted research of noncitizen defendant decision-making specifically is lacking. In 2017, the same year as *Lee,* a group of scholars published *Understanding Guilty Pleas Through the Lens of Social Science*, which identified the need to "develop new models to inform frontline practice and policy," particularly as these models relate to noncitizens facing deportation.[256] Current social science literature emphasizes the need to understand defendant decision-making on an individual level to understand why certain defendants deviate from the models. Noncitizen defendants whose paramount concern is avoiding deportation may be more likely to deviate from the traditional defendant decision-making models. For noncitizen defendants, there may be several factors identical to those impacting decision-making for citizen defendants—such

[252] State v. Bozso, 2020-Ohio-3779, 164 N.E. 344, 350, at ¶ 26.
[253] *Id.*
[254] *Id.*
[255] *Id.* at 349.
[256] Allison D. Redlich et al., *Understanding Guilty Pleas Through the Lens of Social Science*, 23 Psych., Pub. Pol'y, & L. 467 (2017).

as individual risk tolerance, psychological biases, time pressures, and the sequence of information received. But there may also be other factors unique to noncitizen defendants' processes, such as time spent in the United States, language access and comprehension of the proceedings, prospects in immigration court and the possibility of relief from removal, access to an immigration attorney, the trauma of the immigrant experience and fear of return to their home country.

Social science theories in their current state offer courts a baseline for understanding how, in the aggregate, defendants make decisions, but researchers have determined that these theories often need adjustment for certain individual defendants or groups of defendants. Further research is needed to fully understand how the unique pressures of the crimmigration system impact the decision-making of noncitizen defendants. The often disproportionately punitive consequence of deportation, and its necessary counterpart immigration detention, undoubtedly have severe effects on a noncitizen defendant's decision to accept or reject a plea. However, until research is conducted on this specific subset of defendants, we infer the exact nature of those effects from other studies. In the noncitizen defendant plea bargain context, assertions about what is "common sense," "rational," and "obvious" are currently assumptions.

Researchers and scholars have an opportunity to shape the jurisprudence in this rapidly developing area of law. With most criminal proceedings ending with a plea bargain and with the increasing interaction of the criminal and immigration systems, the potential real-world impacts of research and social science literature specific to noncitizen defendant decision-making are enormous. Courts are struggling to piece together a test that accurately reflects how noncitizen defendants make decisions and are looking for guidance. The stakes could not be higher. Researchers and scholars can step in with informed guidance that ensures that the *Lee* prejudice inquiry accurately reflects reality.