

Local Prosecutors as Deportation Gatekeepers

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Tagged as : [Immigration](#)

Date : January 8, 2014

Stephen Lee, [De Facto Immigration Courts](#), 101 **Cal. L. Rev.** 553 (2013).

In *De Facto Immigration Courts*, [Stephen Lee](#) untangles part of the thicket that is immigration law. Immigration law is a dense and unique fusion of administrative law, constitutional law, criminal law, and more. It is these intersections, in the context of the very human story of migration, which give immigration law its essence. Professor Lee's article identifies and explores an underexposed phenomenon arising from immigration law's dependence on criminal law and criminal procedure.

Professor Lee's article focuses on how events in state and local criminal law proceedings affect eventual federal civil law agency removal (deportation) proceedings in immigration courts. Specifically, he looks at the impact of state and local prosecutors' charging and plea choices in criminal cases in eventual agency immigration law proceedings. He argues that criminal court systems are functioning as de facto immigration courts.

Because immigration law has grown to depend on criminal convictions to determine who may legally enter and remain in the United States, what happens during a criminal case often will determine whether an individual is removable under the immigration statutes. The federal immigration statutes contain intricate formulations for determining whether a particular conviction falls into a category that makes a person removable. Because those formulations are known, the immigration consequences of any conviction are (or should be) a major factor in determining the outcome of a criminal case with a non-citizen defendant. Prosecutors may choose to charge tough or leniently, or to agree or disagree to certain plea deals with immigration consequences in mind. The Supreme Court recently recognized this power in [Padilla v. Kentucky](#), but Professor Lee goes further by assessing the phenomenon. He evaluates a system where local law enforcement officials hold the power to "control the pool of removable immigrants." Professor Lee shines a needed spotlight on this power, gives the phenomenon a name, and insightfully evaluates the trend.

The immigration statutes are harsh and complex when it comes to the consequences of criminal convictions. Shoplifting, for example, can qualify as an "aggravated felony." Let me explain how. The immigration law definition of "aggravated felony" includes a theft offense where the "term of imprisonment" is at least one year. The phrase "term of imprisonment," it so happens, ignores any suspensions and looks only at the term ordered. Also, in immigration law, a "conviction" includes a guilty plea. So, if an individual accepts a plea of shoplifting with a one-year suspended sentence, voilà, we have an aggravated felony. Therefore, a guilty plea to shoplifting, which may seem like an acceptable deal from a criminal law perspective, renders an individual deportable and ineligible for almost all forms of relief from removal as an aggravated felon. If the deal had been structured differently (for example, one day less than one year), the conviction would not qualify as an aggravated felony.

State and local prosecutors, of course, are essential players in structuring plea deals. By agreeing to one year or one day less than one year, they also determine removability. One of Professor Lee's major

contributions is that he recognizes that state and local prosecutors control the pool without federal executive branch oversight. This is not a delegation of executive power, as state and local prosecutors are carrying out their traditional criminal law function. State and local prosecutors do not need federal executive branch permission to charge in a certain way or to accept certain plea deals. In this way, however, they affect federal immigration enforcement. The choices of state and local prosecutors may not be in sync with federal enforcement policy, and Professor Lee has advanced immigration law scholarship by acknowledging and confronting this disconnect.

The power of state and local prosecutors over federal immigration law enforcement is not absolute. As Professor Lee explains, a prosecutor cannot force the federal government to initiate removal proceedings (although certain convictions may make removal proceedings almost guaranteed). The federal government regularly exercises prosecutorial discretion in deciding whether to initiate agency removal proceedings. The impact of state and local prosecutors may also be limited if a foreign national is removable for some other, non-criminal reason. Also, prosecutors may be influenced by a variety of constraining factors, such as a desire to maintain a good relationship with immigrant communities, the visibility and seriousness of the criminal activity, and resource limitations.

Beyond acknowledging and confronting the phenomenon of de facto immigration courts, Professor Lee explores how this reality might be improved. He recommends that Congress consider formalizing the role of criminal courts by reinstituting the JRAD (Judicial Recommendation Against Deportation). Under the JRAD regime, sentencing judges had the discretion to recommend against deportation. While Congress eliminated the power to make such recommendations in 1990, Professor Lee asserts that a revitalized JRAD power would provide some oversight over the gatekeeping power of prosecutors. Additionally, Professor Lee emphasizes a need to consider how state and local prosecutors engage in plea bargaining in cases with immigration consequences, including whether there should be more standardized practices.

Professor Lee's work reveals that when Congress set up the immigration laws to rely on criminal convictions to determine who may join or who must leave our society, Congress in effect gave state and local prosecutors a major role in the selection process. This is an important discovery, for it calls into question the true nature of a conviction-based removal—is it based on an exercise of federal or state power? Administrative adjudication is also implicated. This is an area not fully explored by Professor Lee. If prosecutors hold the power to dictate whether someone is removable, that effectively neuters the administrative immigration courts. If immigration judges are powerless in the face of a conviction, then the role of immigration judges is simply to give effect to the result in state court. The immigration court system [is effectively avoided](#) if a prosecutor has achieved a result in the criminal court system that leaves nothing for an immigration judge to do.

Cite as: Jill Family, *Local Prosecutors as Deportation Gatekeepers*, JOTWELL (January 8, 2014) (reviewing Stephen Lee, *De Facto Immigration Courts*, 101 **Cal. L. Rev.** 553 (2013)), <https://lex.jotwell.com/local-prosecutors-as-deportation-gatekeepers/>.