



IMMIGRATION

**By Brittany Brown and
Meagan Hu**

In the early spring of 2017, Jessica Pago¹ was led out of Manhattan criminal court in handcuffs by immigration officers. What was meant to be a non-eventful day in misdemeanor court – Jessica expected to resolve her case with a conditional discharge sentence – turned into a frantic, panicked, and traumatizing scene for both her and those who witnessed the ensuing chaos. When Jessica’s attorney was alerted to the presence of Immigration and Customs Enforcement (ICE) officers in court that day, she asked the judge to consider setting bail so that her client could avoid going directly into ICE’s custody after her case was over. This is because, thanks to New York City’s Detainer Discretion Law that was passed in 2014, the Department of Corrections will generally only honor ICE requests to hold a person if ICE first obtains a judicial warrant, and if the person in question

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was convicted of a violent felony in the past five years. This law has protected many noncitizens from being taken directly into ICE custody from New York City jails.

In the half hour that the judge took to consider this request, the atmosphere in the courtroom was tense and fraught. Jessica was shaking and crying. The court sergeant mercifully let her use her cell phone in the courtroom to say goodbye to one of her brothers. Her attorneys tried to calm her while also trying to explain what was about to happen to her. And all the while, the courtroom was packed with

¹ The client’s name has been changed for this article in order to protect her privacy.

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other people waiting for their own cases to be called, witnesses to the unfolding panic, confusion, and tears. Ultimately, the judge concluded that she was unable to set bail and Jessica was sentenced. Everyone readied themselves to exit the courtroom. The moment that Jessica and her attorneys entered the vestibule, ICE officers began to apprehend her. As the arrest was about to happen, a court officer told the attorneys to leave the vestibule and would not let them witness Jessica's arrest.

Less acknowledged, but equally important in this fight against our nation's worst nativist impulses is the role that criminal defense attorneys play.

This troubling convergence between state criminal law and federal civil law is becoming an all-too-common phenomenon in our state court systems. Since January 20, 2017, immigration lawyers have felt a renewed sense of urgency and purpose as they work to defend against these and other assaults on the rights of noncitizens issuing from the Trump Administration. Less acknowledged, but equally important in this fight against our nation's worst nativist impulses is the role that criminal defense attorneys play, often as the first line of defense for noncitizens living in the United States. This article will provide an overview of how the immigration landscape has changed under the Trump Administration and explain how criminal defense attorneys can best prepare themselves to protect noncitizen clients.

The Trump Administration wasted no time in implementing its aggressive immigration enforcement agenda. Just five days after assuming office, President Trump signed Executive Order 13768, "Enhancing Public Safety in the Interior of the United States," which vastly expanded the categories of people subject to removal enforcement. Under the Obama Administration, the Department of Homeland Security (DHS) prioritized the deportation of people with criminal records, reasoning that since DHS has the resources to deport only a portion of the approximately 11 million undocumented people living in the United States, it would focus its enforcement efforts on only those with criminal records. Trump's executive order, by contrast, no longer exempts any class or category of removable noncitizen from being detained and deported. It also calls for the hiring of 10,000 new immigration officers to enforce this new directive, and for increased state and local cooperation with ICE "to the maximum extent permitted by law."

Since this Executive Order went into effect, there has been a marked increase in ICE removal enforcement efforts throughout the country. While DHS Secretary John Kelly described these enforcement efforts as "routine, daily" operations targeting "public safety threats," the reality of who is being targeted belies this claim. ICE officers are now arresting any removable noncitizen who crosses their paths, even if the individual does not have a criminal record. Moreover, these arrests are being conducted indiscriminately and without regard to humanitarian factors like rehabilitation, family ties, or length of time spent in the country. According to figures released by DHS, in the first three months of 2017, immigration arrests increased by 38 percent compared with the same period last year. Here in New York City, as of April 2017, the NYPD had already received 182 requests from ICE to



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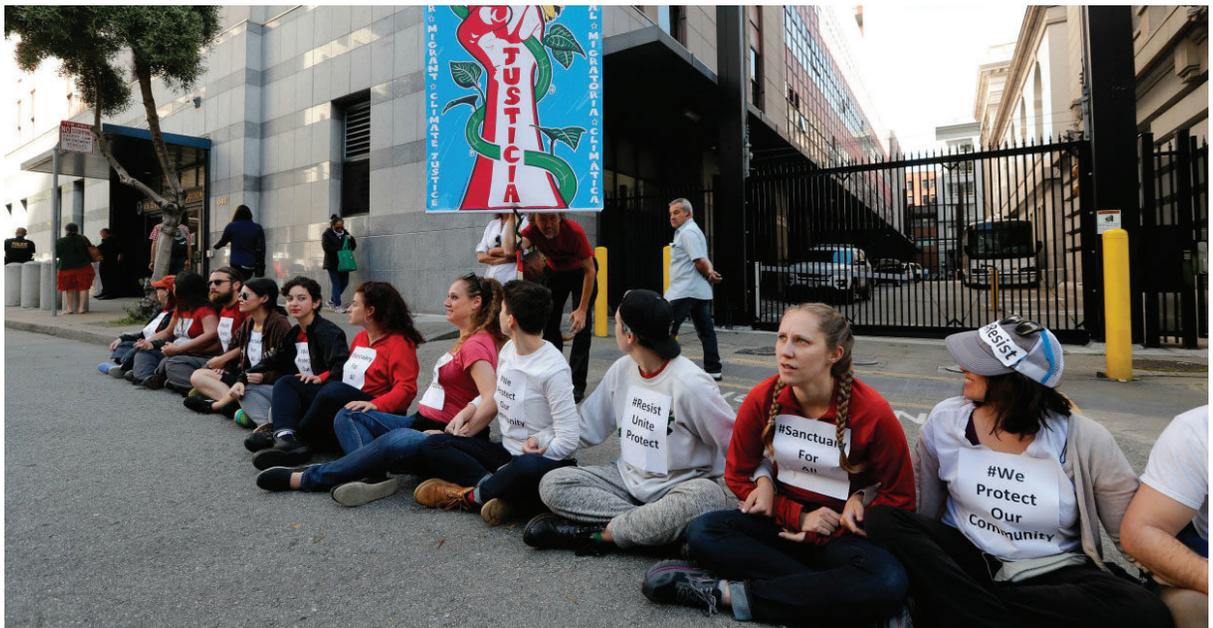
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hold noncitizens in NYPD custody beyond the date of their scheduled release so that ICE could pick them up, whereas the NYPD only received 72 such requests in all of 2016.

The impact of this increased ICE enforcement activity is severe and detrimental. Advocates have already observed that the widespread fear, anxiety, and misinformation of these aggressive enforcement efforts dissuades immigrants and their families from reporting crimes or otherwise engaging with the criminal justice system. It also leads to their avoidance of schools, hospitals, and other civic institutions out of fear that involvement will lead to entanglement with immigration authorities. Far from the Executive Order's stated goal of enhancing public safety, we may start to observe in the coming months that these federal policies have the opposite effect of making us all far less safe.

The criminal justice system is in many ways ground zero for immigration enforcement activity. Whenever someone is arrested, local law enforcement agencies share fingerprint information with several national databases, to which DHS has access. In this way, a mere arrest can alert DHS to the existence and location of a potentially deportable noncitizen. From there, DHS can access publicly available information on WebCrimis to find out the date and location of a client's next court date.



Protestors block the bus and transport gate of the U.S. Immigration and Customs Enforcement building during the May Day rally in San Francisco, California, May 1, 2017. (Photo: John G. Mabanglo/EPA /Newscom)

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Criminal defense attorneys therefore play a crucial role, as a noncitizen's arrest is often the first time they've ever met with an attorney, and most non-citizens are unaware of the complexities of immigration law, from the types of criminal convictions that can render them deportable, to the types of benefits for which they may be eligible. The first arraignment, or post-arraignment, meeting with a client is an excellent opening to gather information about the criminal case, as well as biographical information that will be important for analyzing a client's immigration situation. It is an especially important information-gathering opportunity for attorneys working in jurisdictions that do not have the protection of a detainer law so that attorneys can take immigration into consideration in devising a custody strategy. By developing certain interview strategies, defense attorneys can expedite the immigration analysis. See sidebar on page 29 for a suggested list of questions.

It is crucial to keep in mind that noncitizen clients are often not identifiable by sight or even through conversation. It is not uncommon for a person to have been brought to the United States as a child and give no outward indication of not being native born. For this reason, it is critical to ask every single client, "Where were you born?" and explain that any contact with the criminal justice system is potentially dangerous for a noncitizen, regardless of status.

Since immigration law is a notoriously complex area of the law, close collaboration with a criminal-immigration specialist is a necessity. A thorough criminal-immigration specialist's primary responsibility is to advise about the potential immigration consequences of a guilty plea or trial outcomes. Time

permitting, a thorough screening may also allow the criminal-immigration specialist to inform the noncitizen client of eligibility for certain immigration benefits, including possible defenses in a deportation trial and any lawful statuses for which the client might qualify. Even though the consulting immigration attorney likely cannot take on full representation in immigration matters, the client will at least learn whether it is in their interest to hire a private immigration attorney.



Understanding the potential immigration consequences can also be used in negotiations with district attorneys. Prosecutors often need a reason to make a certain offer, and knowledge that a person could be spared deportation, or at least have a chance at fighting deportation, can be the basis on which a particular plea or sentence is crafted.

It is also important to keep in mind that a case which seems hopeless at the outset because deportation appears unavoidable may be salvageable with

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creative problem solving. Perhaps there is a way to tweak the sentence or to advocate for an alternate penal subsection which would make a difference for the client's immigration future. Similarly, a carefully crafted plea allocation could mean the difference in a person's eligibility for permanent residency. For these reasons, it is always worth consulting with an immigration attorney when you are representing a noncitizen. For example, while a noncitizen is likely to become deportable if he pleads guilty to unlawful possession of marijuana, he may avoid becoming deportable if he specifies at the plea allocation that the amount of marijuana involved "less than 30 grams." Sometimes pleading to a different subsection, such as one with a reckless mens rea, or a sentence of 364 days rather than one year, can preserve a client's right to defend against deportation. And even if a client is already a prime target for ICE arrest, an immigration attorney can at the very least thoroughly advise a defendant on their rights if they encounter ICE officers, as well as what the client can expect from the immigration court system.

In situations where a client's best option is to plead to an offense that will render them deportable, it is often the best practice to file a direct notice of appeal. In some cases, the fact that a conviction is on appeal can prevent an immediate ICE arrest. It can also lead to the client's release from immigration detention and the termination of their deportation case. In most cases, filing a direct notice of appeal and, where appropriate, the *in forma pauperis* motion, is the best course of action for a noncitizen client, but this practice should be discussed with the client and the consulting immigration attorney.

Finally, defense attorneys can take certain steps to protect immigrant clients when ICE is present in the courtroom, such as advising clients to arrive early and to wait inside the courtroom instead of the hallway. If a client is arrested, clients should be advised to exercise their right to remain silent and not to sign anything. If the attorney has an opportunity to speak with ICE, ICE should be informed that the client is aware of their rights and should not be questioned without a lawyer present. If possible, defenders can also go on the record to detail ICE's actions in court and request that the client be taken into state custody so that the criminal case is not impeded by the client being taken to a DHS detention facility. For more helpful tips, see the Immigrant Defense Project's "Practical Tips for Defenders on ICE at Courts," available at their website: www.immigrantdefenseproject.org.

Immigration law, and specifically criminal-immigration law, is its own specialty. Criminal defense attorneys are not expected to be experts in both fields. But as the Supreme Court made clear in *Padilla v. Kentucky*, defense attorneys have a



Yoko Ono, John Lennon and their immigration attorney, Michael Wildes (right), leave the Immigration and Naturalization Service in New York City on March 16, 1972.

duty to make sure that their clients are informed of any immigration consequences that may result from a criminal case. 559 U.S. 356 (2010). Fortunately, the number of practitioners specializing in the “crim-imm” field is growing. Even if an office does not employ an immigration attorney, there are organizations and consultants readily available, and it is in every defender’s best interest to establish a relationship with a knowledgeable immigration attorney. The American Immigration Lawyers Association has a tool for locating local attorneys: <http://www.aialawyer.org/>.

Additionally, New York’s Office of Indigent Legal Services has set up Regional Immigration Assistance Centers to provide criminal-immigration law assistance to defenders throughout the state. To find the Regional Immigration Assistance Center closest to you, please consult their website: <https://www.ils.ny.gov/content/regional-immigration-assistance-centers>.

Even the most diligent defense attorney will not be able to

protect every client from deportation. But in Jessica Pago’s case, her defender’s actions in court that day and detailed understanding of her client’s circumstances meant the difference between Jessica spending weeks or months in immigration detention, and her release from ICE custody later that day. In the midst of the chaos in court, Jessica’s attorney explained to the arresting ICE officers that Jessica was being treated for serious mental health issues and would likely suffer a psychotic break if detained. Although she was still arrested, her defender was able to quickly retrieve a psychiatrist’s letter from the file and give it to Jessica to take with her. Thanks to this letter, she was released from ICE custody later that day after her psychiatrist was called and the contents of the letter were confirmed. Jessica is not out of the woods yet, as she is now in the process of fighting her deportation case. But she at least does not have to suffer the trauma of being separated from her family while she fights her case from immigration detention, thanks to her public defender’s quick thinking in court that day. **A**

Best Practices

Questions to Ask When Interviewing a Noncitizen Client

Where were you born? (Get in the habit of asking all clients this question, even if you think they are a U.S. citizen.)

When did you first come to the United States?

How did you enter the U.S.? (i.e. crossed the border, arrived with a visa)

Have you ever had any interactions with ICE (the immigration police)?

If you have left the U.S. since first entering, when was your most recent entry?

Have you ever filed an application with immigration? What application and when was it filed?

Do you have an immigration attorney?

Before Resolving a Case

Make sure your client is fully informed of consequences of any decisions they are making.

Decisions include taking a plea vs. going to trial, how they will allocute, and what the sentence will be.

Consequences include not only whether a plea makes someone deportable, but also foreign travel, eligibility for future defense in immigration court, eligibility for future benefits and immigration status.