Note

Sharks and Minnows: Using Temporary Alien Deportation Immunity to Catch the Big Fish

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Introduction

Imagine a lawful permanent resident ("LPR"), an immigrant alien with a "Green Card," is involved in a bank robbery. The LPR drives a co-conspirator to the bank and waits outside as the getaway driver. While inside the bank, the co-conspirator uses a gun to wound a bank security guard who tries to stop the robbery. The LPR later is arrested and charged with armed bank robbery and assault with a deadly weapon. The deportation requirements of the Immigration and Nationality Act[1] ("INA") require aliens convicted of such aggravated felonies to be deported.[2] Because his status as an LPR will subject him to this mandatory deportation, the LPR refuses to cooperate with the United States Attorney's Office by providing information about his co-conspirator. Such a refusal to cooperate makes it more difficult for the government to successfully prosecute the major participant in the crime in addition to prosecuting the LPR who was a minor participant in the crime.

Cooperation by minor participants in a crime often is the only way to prosecute the crime's major participants.[3] Defendants in 14.4% of cases that applied the Federal Sentencing Guidelines during fiscal year 2006 received Substantial Assistance Departures[4] from the core guidelines in exchange for cooperation.[5] A prosecutor may offer

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1 Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.).

2 *See* INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) (2000); *id*. § 101(a)(43)(F)–(G), 8 U.S.C. § 1101(a)(43)(F)–(G) (2000); *see also infra* Part I.

3 *See Federal Sentencing Guidelines: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. (2005) (statement of Christopher A. Wray, Assistant Att'y Gen.), *reprinted in* 17 FED. SENT'G REP. 303, 306 (2005) ("Cooperation agreements are an essential component of law enforcement and are necessary to penetrate criminal organizations and to obtain convictions in court."); Ian Weinstein, *Regulating the Market for Snitches*, 47 BUFF. L. REV. 563, 595 (1999) (describing the cooperation of minor participants as a "powerful law enforcement tool" because such cooperation "may make it possible to prosecute significant crimes that might otherwise go unpunished"); *see also* Joseph P. Fried, *Ex-Mob Underboss Given Lenient Term for Help as Witness*, N.Y. TIMES, Sept. 27, 1994, at A1 (recounting the "invaluable" assistance given by mob informant Sammy "the Bull" Gravano in bringing down John Gotti's criminal empire); Ronald Sullivan, *Milken's Sentence Reduced by Judge; 7 Months Are Left*, N.Y. TIMES, Aug. 6, 1992, at A1 (describing how Michael Milken's sentence was greatly reduced by a judge due to his "important" cooperation with authorities).

4 A court has discretion in sentencing to depart from the normal sentencing guidelines when a defendant has provided important assistance "in the investigation or prosecution of another person who has committed an offense." U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2007), *available at* http://www.ussc.gov/2007guid/5k1_1.html.

5 U.S. SENTENCING COMM'N, STATISTICAL INFORMATION PACKET: FISCAL YEAR 2006, at

a Substantial Assistance Departure when a defendant participates in the investigation of, provides information for the prosecution of, or testifies against other offenders.[6] The most frequently occurring prosecutorial benefits of such cooperation include codefendant guilty pleas, new prosecutions, and new convictions.[7]

LPRs who are minor participants in a crime may not want to cooperate with law enforcement agencies when such cooperation will subject them to the INA's mandatory deportation requirements.[8] Many LPRs have appealed their convictions and sought to withdraw their guilty pleas precisely because they would not have initially pled guilty had they been aware of the INA's mandatory deportation requirements.[9]

To create an effective incentive for cooperation by LPRs who are minor participants in a crime, this Note proposes a two-step solution. First, Congress should override, or the Department of Homeland Security ("DHS") should repeal, § 0.197 of Title 28 of the Code of Federal Regulations ("CFR"), which prohibits cooperation agreements that promise nondeportation without the consent of the Under Secretary for Border and Transportation Security at DHS ("DHS Under Secretary").[10] Second, because the mandatory deportation require-

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11 (2006) [hereinafter 2006 STATISTICAL INFORMATION PACKET], *available at* http://www.ussc.gov/JUDPACK/2006/dcc06.pdf.

6 LINDA DRAZGA MAXFIELD & JOHN H. KRAMER, SUBSTANTIAL ASSISTANCE: AN EMPIRICAL YARDSTICK GAUGING EQUITY IN CURRENT FEDERAL POLICY AND PRACTICE 8 (1998), *available at* http://www.ussc.gov/publicat/5kreport.pdf.

7 *Id.* at 11, 29.

8 *See infra* Part I.

9 *See, e.g.*, United States v. Couto, 311 F.3d 179, 181 (2d Cir. 2002); United States v. Banda, 1 F.3d 354, 355 (5th Cir. 1993); Santos v. Kolb, 880 F.2d 941, 942 (7th Cir. 1989); United States v. Campbell, 778 F.2d 764, 766 (11th Cir. 1985); United States v. Parrino, 212 F.2d 919, 920–21 (2d Cir. 1954); *see also* Qiao v. United States, Nos. 07 Civ. 3727(SHS), 98 Cr. 1484(SHS), 2007 WL 4105813, at *2 (S.D.N.Y. Nov. 15, 2007). In the immigration context, motions to withdraw guilty pleas usually accompany claims of ineffective assistance of counsel. *See, e.g.*, *Campbell*, 778 F.2d at 766; *Parrino*, 212 F.2d at 920–21. Motions to withdraw guilty pleas and ineffective assistance of counsel claims are not addressed here, however, because this Note assumes an LPR who is a minor participant in a crime is aware of the deportation consequences of a conviction for that crime. This Note makes this assumption because LPRs unaware of the mandatory deportation requirements of the INA are more likely to cooperate with law enforcement agencies. Resulting ineffective assistance of counsel claims and the accompanying motions to withdraw guilty pleas are based on inadequate (or incorrect) knowledge of the consequences of cooperation. For a discussion of ineffective assistance of counsel claims in immigration law, see generally Rob A. Justman, *The Effects of AEDPA and IIRIRA on Ineffective Assistance of Counsel Claims for Failure to Advise Alien Defendants of Deportation Consequences of Pleading Guilty to an "Aggravated Felony,"* 2004 UTAH L. REV. 701 (2004).

10 28 C.F.R. § 0.197 (2007); *cf.* 6 U.S.C. § 251 (2000) (transferring detention and removal

ments that accompany criminal convictions discourage LPRs from cooperating with law enforcement agencies, prosecutors should exercise discretion and grant temporary deportation immunity to LPRs who are minor participants in a crime. Under this framework, an LPR still would be prosecuted for the actual crime he committed; however, temporary deportation immunity would allow for a preconviction nondeportation agreement that prevents an LPR who is a minor participant in a crime from being deported for the LPR's role in that crime. In exchange for not being deported, the LPR would be required to cooperate with law enforcement agencies by providing information about the major participants in a crime.

Part I of this Note illustrates why LPRs who are minor participants in a crime may not want to cooperate with law enforcement agencies. Part II discusses the criteria within which an incentive for cooperation should operate. Part III demonstrates that existing incentives for cooperation either do not adhere to such criteria or are ineffective incentives for cooperation. Finally, Part IV proposes that § 0.197 be repealed and that prosecutors use temporary deportation immunity as an incentive for cooperation by LPRs who are minor participants in a crime.

I. When the Minnows Are Not Biting: Why Lawful Permanent Residents May Not Cooperate

LPRs who are minor participants in a crime may not want to cooperate with law enforcement agencies because of the mandatory deportation requirements that accompany many criminal convictions. The broad definitions of the crimes that trigger such mandatory deportation further discourage LPRs who are minor participants in a crime from cooperating with law enforcement agencies by providing information about co-conspirators who are the major participants in a crime.

LPRs are deportable if convicted of criminal offenses relating to controlled substances, certain firearms violations, crimes of moral turpitude, or aggravated felonies.[11] Of the 208,521 aliens deported from the United States in fiscal year 2005, forty-three percent, or 89,406 aliens, were convicted of criminal offenses.[12] Controlled substance offenses include virtually any kind of drug-related conduct legislatures

program functions of the Commissioner of the Immigration and Naturalization Service ("INS Commissioner") to the DHS Under Secretary).

11 INA § 237(a)(2), 8 U.S.C. § 1227(a)(2) (2000).

12 OFFICE OF IMMIGRATION STATISTICS, DEP'T OF HOMELAND SEC., 2005 YEARBOOK OF

have held criminal,[13] and firearms violations concern any law for purchasing, selling, exchanging, using, owning, possessing, or carrying a "firearm or destructive device" as defined by federal law.[14] Crimes of moral turpitude "refer[ ] generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general."[15] Crimes of moral turpitude include those with elements of fraud, larceny, or intent to harm persons or things, such as arson, blackmail, perjury, tax evasion, kidnapping, and prostitution.[16] Finally, aggravated felonies include common aggravated felonies such as murder, rape, and sexual abuse of a minor.[17] Because of the Antiterrorism and Effective Death Penalty Act[18] ("AEDPA") and the Illegal Immigration Reform and Immigrant Responsibility Act[19] ("IIRIRA"), which expanded the definition of "aggravated felony" in 1996,[20] however, the aggravated felony category also encompasses crimes that are neither aggravated nor felonies.[21] Such crimes include theft offenses (including receipt of stolen property) and crimes of violence for which the term of imprisonment is at least one year; offenses that involve fraud or deceit in which the loss to the victim exceeds $10,000; and attempts or conspiracies to commit such offenses.[22]

IMMIGRATION STATISTICS 105 (2006), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/OIS_2005_Yearbook.pdf.

13 INA § 237(a)(2)(B), 8 U.S.C. § 1227(a)(2)(B). A single offense involving possession for personal use of thirty grams or less of marijuana, however, does not constitute a controlled substance offense for immigration purposes. *Id.*

14 *Id.* § 237(a)(2)(C), 8 U.S.C. § 1227(a)(2)(C).

15 *In re* Danesh, 19 I. & N. Dec. 669, 670 (B.I.A. 1988). The phrase "crimes of moral turpitude" is not defined in the INA but, instead, is defined by the Board of Immigration Appeals ("BIA"), which is the highest administrative body for interpreting and applying immigration law. *See* Board of Immigration Appeals, http://www.justice.gov/eoir/biainfo.htm (last visited Oct. 31, 2008).

16 9 U.S. DEP'T OF STATE, FOREIGN AFFAIRS MANUAL § 40.21(A) n.2 (2005) [hereinafter FAM], *available at* http://www.state.gov/documents/organization/86942.pdf.

17 INA § 101(a)(43)(A), 8 U.S.C. § 1101(a)(43)(A).

18 Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered sections of 8, 18, 22, 28, and 42 U.S.C.).

19 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified in scattered sections of 8, 18, and 28 U.S.C.).

20 *See* AEDPA § 440(e); IIRIRA § 321.

21 Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1939 (2000); *see also* INA § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G).

22 INA § 101(a)(43), 8 U.S.C. § 1101(a)(43); *see also* Susan L. Pilcher, *Justice Without a Blindfold: Criminal Proceedings and the Alien Defendant*, 50 ARK. L. REV. 269, 302–03 (1997); Pamela Constable & William Branigin, *Thousands Confront Deportation Dragnet's Longer*

In addition to the wide range of crimes by which an alien may trigger the INA's mandatory deportation requirements, the INA contains an expansive definition of "conviction" that subjects even more aliens to mandatory deportation. The INA defines a conviction to include a formal judgment of an alien's guilt entered by a court.[23] The definition thus includes pleas of guilty or nolo contendere, as well as admissions of facts sufficient to warrant a finding of guilt, if the judge has imposed some form of punishment, penalty, or restraint on the alien's liberty.[24]

In the hypothetical that introduced this Note, the LPR was charged with armed bank robbery and assault with a deadly weapon. Both of these crimes are aggravated felonies, either of which would trigger the INA's mandatory deportation requirements.[25] If the LPR agrees to cooperate with the United States Attorney's Office and provide information about his co-conspirator, the LPR may be able to plead guilty to lesser offenses such as larceny and simple assault. Because of the INA's thorough definitions of "conviction" and "aggravated felony," however, pleading guilty to such lesser offenses also would trigger the mandatory deportation requirements of the INA if the term of imprisonment for the LPR is at least one year.[26]

II. Fishing Licenses and Regulations: Criteria for an Incentive for Cooperation

The criminal justice system has certain background principles that are important to understand when the granting of temporary deportation immunity in exchange for cooperation may be appropriate and effective. The goals of criminal law and sentencing, plea bargaining, and the Immigration and Customs Enforcement ("ICE") branch of DHS[27] are three sets of criteria that form the structure within which the criminal justice system and immigration law operate. An incentive

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Reach, WASH. POST, Oct. 26, 1997, at A3 (noting the INA "expanded the range of crimes for which federal authorities can deport legal residents" to include "lesser offenses such as shoplifting, credit card fraud, simple assault and drug use"). Many aggravated felonies, such as receiving stolen property and fraud, are also considered crimes of moral turpitude. FAM, *supra* note 16, at 3–4.

23 INA § 101(a)(48), 8 U.S.C. § 1101(a)(48).

24 *Id.*

25 *See supra* note 2 and accompanying text.

26 *See* INA § 101(a)(43), (48), 8 U.S.C. § 1101 (a)(43), (48); *id.* § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii).

27 ICE performs the investigative and enforcement functions of the former Immigration and Naturalization Service. *See* U.S. Immigration and Customs Enforcement, ICE Operations, http://www.ice.gov/about/operations.htm (last visited Oct. 31, 2008).

for cooperation should account for such criteria with regard to the LPR who is a minor participant in a crime. If an incentive for cooperation does not account for such criteria, law enforcement agencies ultimately may effect the prosecution of the major participants in a crime at the expense of not prosecuting the minor participants. Such a situation contradicts the very reason for seeking cooperation initially—to prosecute the major participants in a crime *in addition* to prosecuting the LPR who is a minor participant.

The first set of criteria that an incentive for cooperation should satisfy concerns the purposes of criminal law and sentencing. The goals of criminal law and sentencing include retribution, incapacitation, deterrence, and rehabilitation.[28] Retribution demands punishment under a theory of "just deserts" in a manner that reflects the seriousness of the offense.[29] Incapacitation relies on confinement to prevent future crimes by recidivist offenders,[30] and deterrence is a theory of punishment that seeks to convince both society and a particular offender not to commit (or to repeat) the crime for which the offender is being sentenced.[31] Finally, rehabilitation involves therapy, treatment, or training to reform the wrongdoer.[32] An incentive for cooperation should operate in accordance with the purposes of criminal law and sentencing to ensure it does not threaten the ability of retribution, incapacitation, deterrence, and rehabilitation to determine the appropriate punishment for an LPR who is a minor participant in a crime.[33]

The second set of criteria for which an incentive for cooperation should account involves the arguments for and against plea bargaining.[34] The justifications for (or goals of) plea bargaining include the

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28 *See* 18 U.S.C. § 3553(a)(2) (2006) (stating that in determining a sentence to be imposed, a court must consider the need for that sentence "(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner"); *see also* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 14–19 (4th ed. 2006) (discussing the most common theories of criminal punishment); Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 70–74 (2005) (listing the five mechanisms of crime-control through criminal penalties as "rehabilitation, incapacitation, specific deterrence, general deterrence, and denunciation").

29 *See* DRESSLER, *supra* note 28, at 16–19.

30 *See id.* at 15.

31 *Id.* at 15–16.

32 *Id.* at 16.

33 *See id.* at 11.

34 Whether plea bargaining as an institution should be maintained or eliminated is beyond the scope of this Note. For such a discussion, see generally Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1 (1979) (discussing the history of plea bargaining); Albert

more efficient allocation of prosecutorial resources, the alleviation of congested caseloads, greater flexibility in the criminal justice system, allowing defendants to acknowledge guilt and manifest a willingness to assume responsibility for their actions, and allowing victims to be shielded from trials.[35] Critics contend that plea bargaining can undermine the integrity of the criminal justice system and the deterrent effect of criminal sanctions, result in overly lenient sentences, and coerce innocent defendants to plead guilty.[36] An incentive for cooperation should operate in accordance with the rationales for plea bargaining while avoiding its criticisms to ensure the incentive itself does not undermine the prosecution of the LPR who is a minor participant in the crime.

The third set of criteria that an incentive for cooperation should satisfy concerns the purposes of ICE. The underlying goals of ICE include protecting America and upholding public safety.[37] ICE also is concerned with promoting the "efficient and effective enforcement of the immigration laws and the interests of justice."[38] An incentive for cooperation should operate in accordance with the goals of ICE to ensure the very incentive that overcomes the threat of the INA's mandatory deportation requirements does not simultaneously undermine immigration law by enabling the LPR who is a minor participant in a crime to create "vulnerabilities that pose a threat to our nation's borders."[39]

W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652 (1981) (criticizing plea bargaining); Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969 (1992) (arguing in support of reformed plea bargaining); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979 (1992) (arguing the abolition of plea bargaining would serve both justice and efficiency); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992) (arguing for reform, rather than the abolishment, of plea bargaining based on contract principles).

35 Jeff Palmer, *Abolishing Plea Bargaining: An End to the Same Old Song and Dance*, 26 AM. J. CRIM. L. 505, 512–18 (1999); *see also* Douglas D. Guidorizzi, *Should We Really "Ban" Plea Bargaining?: The Core Concerns of Plea Bargaining Critics*, 47 EMORY L.J. 753, 765–67 (1998).

36 Guidorizzi, *supra* note 35, at 767–72; *see also* Palmer, *supra* note 35, at 518–28 (laying out similar criticisms of plea bargaining).

37 U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, ICE FISCAL YEAR 2006 ANNUAL REPORT 2 (2006) [hereinafter 2006 ICE REPORT], *available at* http://www.ice.gov/doclib/about/ICE-06AR.pdf.

38 Memorandum from INS Comm'r Doris Meissner on Exercising Prosecutorial Discretion to Reg'l Dirs. et al. 1 (Nov. 7, 2000) [hereinafter Meissner Memorandum], *available at* http://www.bibdaily.com/pdfs/AS%20MYERS%20MEMO%20RE%20PROSECUTORIAL%20AND%20CUSTODY%20DISCRETION.pdf.

39 *See* 2006 ICE REPORT, *supra* note 37, at 2.

As discussed below, repealing § 0.197 of Title 28 of the CFR and subsequently offering temporary deportation immunity to LPRs who are minor participants in a crime satisfies these three sets of criteria.[40]

III. Worms, Lures, and Flies: Incentives for Cooperation That Will Not Catch the Major Participants of a Crime

Existing incentives for cooperation either do not conform to the criteria that an incentive for cooperation should satisfy or are ineffective at garnering cooperation by LPRs who are minor participants in a crime. Existing incentives for cooperation by LPRs who are minor participants in a crime are based on the current forms of relief by which an LPR may avoid deportation. There are three categories of such relief from deportation: preconviction relief, postconviction relief, and other relief that may occur at any time. None of the forms of relief in any of these categories, however, effectively creates an incentive for LPRs who are minor participants in a crime to cooperate in prosecuting the major participants in the crime while simultaneously satisfying the criteria discussed above[41] with respect to the minor participants themselves.

A. Preconviction Relief

Although preconviction relief creates an effective incentive for LPRs who are minor participants in a crime to cooperate, it does not operate in accordance with the goals of criminal law and sentencing, plea bargaining, and ICE. Preconviction relief generally involves decisions not to prosecute an offender at all, or to prosecute for a lesser offense, thereby allowing LPRs who are minor participants in a crime to avoid prosecution for the actual crimes they have committed. Decisions not to prosecute manifest themselves in the form of grants of immunity and nonprosecution agreements.[42] Decisions to prosecute for a lesser offense involve plea agreements and cooperation agreements that involve dismissed charges, reduced charges, or sentencing recommendations.[43] Crime-related grounds of deportability are based

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40 *See infra* Part IV.A.

41 *See supra* Part II.

42 *See* U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-27.230 cmt. (2007), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm ("There may be some cases . . . in which the value of a person's cooperation clearly outweighs the Federal interest in prosecuting him/her. These matters are discussed . . . in connection with plea agreements and non-prosecution agreements in return for cooperation.").

43 *See* FED. R. CRIM. P. 11(c)(1) (allowing plea agreements); U.S. SENTENCING GUIDELINES MANUAL, *supra* note 4, § 5K1.1, *available at* http://www.ussc.gov/2007guid/5k1_1.html (al-

on the nature of the charges and the length of the sentence imposed.[44] Accordingly, preconviction relief is an effective incentive for cooperation by LPRs who are minor participants in a crime because, by definition, the relief is offered before the INA's mandatory deportation requirements are triggered. The cooperation obtained from grants of immunity, nonprosecution agreements, plea agreements, and cooperation agreements, in turn, enables law enforcement agencies to prosecute the major participants in a crime.

By definition, however, grants of immunity and nonprosecution agreements, as well as certain plea agreements and cooperation agreements, do not always account for the goals of criminal law and sentencing. These grants and agreements do not always enable the various purposes of criminal punishment[45] to determine whether and what punishment is appropriate for the LPR who is a minor participant in a crime.[46] For example, in 2002, two New Jersey police officers who shot three unarmed men during a racially profiled traffic stop agreed to plead guilty to lesser charges in exchange for receiving neither jail time nor probation.[47] Although the officers also agreed to resign from the police force and pay a $280 fine,[48] the lack of punishment in the form of jail time undermined the retributive, rehabilitative, incapacitative, and deterrent purposes of the criminal justice and sentencing systems as a whole. Such a plea agreement in the nonimmigration context helps to demonstrate the consequences a similar agreement with an LPR who is a minor participant in a crime may have.

In terms of the justifications for plea bargaining, preconviction relief does allow for the more efficient allocation of resources, alleviation of caseloads, greater flexibility in the criminal justice system, and

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lowing "substantial assistance" departures for cooperation); *see also* U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: DOWNWARD DEPARTURES FROM THE FEDERAL SENTENCING GUIDELINES 42 fig.11 (2003), *available at* http://www.ussc.gov/departrpt03/departrpt03.pdf (indicating that in fiscal year 2001, 18.1% of downward departures in cases involving the Federal Sentencing Guidelines were made pursuant to plea agreements).

44 *See* INA § 237(a)(2), 8 U.S.C. § 1227(a)(2) (2000).

45 *See supra* notes 28–32 and accompanying text.

46 *Cf.* 18 U.S.C. § 3553(a)(2) (2000) (identifying factors to be considered by a court in sentencing a criminal defendant); DRESSLER, *supra* note 28, at 11 (explaining that the moral theories used to justify punishment must be considered when determining punishment for a particular offense and offender).

47 David Kocieniewski, *New Jersey Troopers Avoid Jail in Case That Highlighted Profiling*, N.Y. TIMES, Jan. 15, 2002, at A1.

48 *Id.*

shielding of victims from trials.[49] Grants of immunity, nonprosecution agreements, plea agreements, and cooperation agreements, however, do not avoid the criticisms of plea bargaining, because such agreements may undermine the prosecution of the LPR who is a minor participant in a crime.[50] A cooperation agreement in the nonimmigration context, for example, demonstrates the consequences a similar agreement with an LPR who is a minor participant in a crime may have.[51] In that agreement, a powerful member of the Mafia who was involved in nineteen murders was sentenced to only five years in prison in exchange for his cooperation in the prosecution of a more powerful member of the Mafia.[52] Although the agreement did provide for a maximum sentence of twenty years in prison,[53] even such an overly lenient maximum sentence undermines both the integrity of the criminal justice system and the deterrent effect of criminal sanctions.[54]

Finally, grants of immunity, nonprosecution agreements, plea agreements, and cooperation agreements do not always operate in accordance with the goals of ICE. Preconviction relief provides the LPR who is a minor participant in a crime with the opportunity to threaten public safety, and thus does not promote the effective enforcement of the immigration laws or the interests of justice.[55] In a series of plea agreements in the immigration context, for example, a Denver District Attorney allowed immigrants who committed assault and drug crimes to plead guilty to agricultural trespassing in order to avoid deportation.[56] Although the immigrants were sentenced to pro-

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49 *Cf.* Guidorizzi, *supra* note 35, at 765–67 (identifying the justifications for plea bargaining); Palmer, *supra* note 35, at 512–18 (same).

50 *But see* U.S. SENTENCING GUIDELINES MANUAL, *supra* note 4, § 6B1.2, *available at* http://www.ussc.gov/2007guid/6b1_2.html (instructing courts to accept plea agreements or cooperation agreements only if the remaining charges adequately reflect the seriousness of the actual offense behavior and if accepting the agreements would not undermine the purposes of sentencing or sentencing guidelines). In some cases, prosecutors account for reduced charges in plea agreements and cooperation agreements by using certain characteristics of a crime as aggravating factors for sentencing purposes. *See* Pilcher, *supra* note 22, at 295.

51 The author was unable to find an example of a similar cooperation agreement in the immigration context.

52 Fried, *supra* note 3.

53 *Id.*

54 *Cf.* Guidorizzi, *supra* note 35, at 770–71 (identifying overly lenient sentences as a criticism of plea bargaining); Palmer, *supra* note 35, at 525–27 (same).

55 *Cf.* 2006 ICE REPORT, *supra* note 37, at 2 (identifying the goals of ICE); Meissner Memorandum, *supra* note 38, at 1 (same).

56 Karen E. Crummy, *Ritter Helped Immigrants Stay; Deportations Avoided via DA's Plea Deals; Assault, Drug Cases Ritter's Office OK'd Trespassing Pleas in 152 Cases. He Says His Staff Alerted Feds if Those Charged Weren't Legal Residents*, DENVER POST, Oct. 1, 2006, at A1.

bation,[57] the lack of punishment in the form of jail time undermined ICE's "efficient and effective enforcement of the immigration laws and the interests of justice"[58] because the immigrants immediately were released back into society.

B. Postconviction Relief

Although postconviction relief operates in accordance with the goals of criminal law and sentencing, plea bargaining, and ICE with regard to the LPRs who are minor participants in a crime themselves, it does not actually create an effective incentive for such LPRs to cooperate, because the relief is offered only after the LPR has become subject to mandatory deportation. Postconviction relief consists generally of statutory relief and nonstatutory relief. Statutory relief includes cancellation of removal,[59] voluntary departure,[60] adjustment of status,[61] and pardons.[62] Nonstatutory relief includes expunged convictions,[63] sentence modifications,[64] and private immigration bills.[65] Post-

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57 *Id.*

58 Meissner Memorandum, *supra* note 38, at 1.

59 INA § 240A, 8 U.S.C. § 1229b (2000) (providing for the cancellation of removal for certain permanent and nonpermanent residents).

60 *Id.* § 240B(a)(1), 8 U.S.C. § 1229c(a)(1) (allowing the Attorney General to permit an alien to voluntarily depart under certain conditions). Because an alien who voluntarily departs the country is not formally deported, no prior deportation exists that would bar the alien's readmission into the country. *See id.* § 212(a)(1)(9)(A), 8 U.S.C. § 1182(a)(1)(9)(A).

61 *Id.* § 245(a), 8 U.S.C. § 1255(a) (allowing for adjustment of status from alien to LPR); Tibke v. INS, 335 F.2d 42, 44 (2d Cir. 1964) (upholding the readjustment of an LPR's status again to an LPR). To adjust the status of an alien to LPR, the alien must be admissible to the United States under section 212(a) of the INA at the time of application. INA § 245(a), 8 U.S.C. § 1255(a). Section 212(h) of the INA is a general waiver of certain crime-related grounds of inadmissibility that may enable an LPR to avoid deportation for a conviction that otherwise would preclude adjustment of status. *See id.* § 212(h), 8 U.S.C. § 1182(h). Because LPRs are deportable based on their criminal history since admission into the country, readjusting an LPR's status to that of an LPR effectively resets the alien's criminal history for deportation purposes.

62 INA § 237(a)(2)(A)(vi), 8 U.S.C. § 1227(a)(2)(A)(vi) (preventing deportation upon a "full and unconditional" pardon by the President of the United States or the governor of any state).

63 *See, e.g.*, *In re* Rodriguez-Ruiz, 22 I. & N. Dec. 1378, 1380 (B.I.A. 2000) (holding an expunged, or otherwise vacated, conviction does not constitute a conviction for immigration purposes).

64 *See, e.g.*, *In re* Song, 23 I. & N. Dec. 173, 174 (B.I.A. 2001) (terminating removal proceedings where an LPR's sentence was reduced to a term of less than one year).

65 *See, e.g.*, Priv. L. No. 104-3, 110 Stat. 4287 (1996) (providing relief from deportation to LPR who previously committed immigration fraud and then married and had a child with a United States citizen, both of whom had a serious disease that required treatment in United States); H.R. REP. NO. 104-810, at 2–3 (1996) (providing the background story for the LPR who received relief under Priv. L. No. 104-3, 110 Stat. 4 (1996)); *see also* Kati L. Griffith, *Perfecting*

conviction relief satisfies the goals of criminal law and sentencing, plea bargaining, and ICE because the relief is not offered until after LPRs who are minor participants in a crime have been prosecuted for the actual crimes they committed. By definition, however, because postconviction relief is not available until after the INA's mandatory deportation requirements have been triggered, postconviction relief does not create an effective incentive for LPRs who are minor participants in a crime to cooperate with law enforcement agencies.

Postconviction relief also is not an effective incentive for LPRs who are minor participants in a crime to cooperate due to three significant limitations of the relief. The first limitation relates to the unavailability of various forms of the relief to LPRs who are minor participants in certain crimes. For example, LPRs convicted of aggravated felonies are ineligible for cancellation of removal and voluntary departure.[66] Instead, aliens convicted of aggravated felonies are "conclusively presumed to be deportable."[67] As described above, the availability of such postconviction relief further is limited because a crime need be neither aggravated nor a felony in order to fall into the aggravated felony category.[68] Similarly, LPRs convicted of crimes of moral turpitude or of controlled substance violations are ineligible for adjustment of status,[69] and a pardon will not negate the immigration

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Public Immigration Legislation: Private Immigration Bills and Deportable Lawful Permanent Residents, 18 GEO. IMMIGR. L.J. 273, 273–74 (2004) (defining such bills as private relief that creates exceptions to public immigration laws).

66 INA § 240A(a), 8 U.S.C. § 1229b(a) (mandating that the Attorney General may cancel the removal of an alien only if that alien, among other things, "has not been convicted of any aggravated felony"); *id.* § 240B(a)(1), 8 U.S.C. § 1229c(a)(1) (disallowing the option of voluntary departure for aliens deemed deportable due to a conviction for an aggravated felony). *But see generally* Family Reunification Act of 2005, H.R. 2055, 109th Cong. § 2(a)(4)–(5) (2005) (died in committee) (proposing to amend section 240A of the INA to allow certain aggravated felons and criminal LPRs who immigrated to the United States during childhood to seek cancellation of removal); Yen H. Trinh, Note, *The Impact of New Policies Adopted After September 11 on Lawful Permanent Residents Facing Deportation Under the AEDPA and IIRIRA and the Hope of Relief Under the Family Reunification Act*, 33 GA. J. INT'L & COMP. L. 543, 566–70 (2005) (discussing how the Family Reunification Act would allow deportation orders to be reversed if the interest in keeping families intact exceeded the severity of the criminal convictions).

67 INA § 238(c), 8 U.S.C. § 1228(c).

68 *See supra* notes 21–22 and accompanying text.

69 *See* INA § 245(a)(2), 8 U.S.C. § 1255(a)(2). An alien is eligible for adjustment of status only if "the alien is eligible to receive an immigrant visa and is admissible to the United States." *Id.* An alien is inadmissible to the United States, however, if the alien committed a crime of moral turpitude or a violation of controlled substances law. *Id.* § 212(a)(2)(A)(i), 8 U.S.C. § 1182(a)(2)(A)(i); *see also* Pilcher, *supra* note 22, at 297 ("The aggravated felon whose offense was neither a crime of moral turpitude nor a crime relating to controlled substance . . . is facially eligible for adjustment of status, if otherwise qualified for an immigrant visa.").

consequences of an LPR's conviction for a controlled substance violation or a firearms offense.[70]

The second limitation that prevents postconviction relief from being an effective incentive for LPRs who are minor participants in a crime to cooperate concerns the application of particular forms of relief in certain situations. An LPR's ability to obtain relief from deportation may depend on whether a court interprets a particular action as expunging a conviction or as modifying a sentence. Whether an expunged conviction is a conviction for immigration purposes depends on if the conviction was vacated for reasons solely related to postconviction events, such as rehabilitation or deportation, or if the conviction was set aside due to a substantive or procedural defect in the underlying proceedings.[71] Conversely, when a court modifies an LPR's sentence, the Board of Immigration Appeals ("BIA") has held that the reduced sentence is used for immigration purposes regardless of the reason for the change.[72] The two forms of relief, however, are difficult to distinguish and thus create uncertainty for LPRs seeking to avoid deportation.[73]

The final limitation that prevents postconviction relief from being an effective incentive for cooperation concerns the obstacles LPRs

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70 *See* INA § 237(a)(2)(A)(vi), 8 U.S.C. § 1227(a)(2)(A)(vi); *cf. id.* § 237(a)(2)(B)–(C), 8 U.S.C. § 1227(a)(2)(B)–(C) (failing to include waiver provisions for presidential or gubernatorial pardons).

71 *Compare In re* Pickering, 23 I. & N. Dec. 621, 624 (B.I.A.) (holding conviction set aside solely for rehabilitative reasons remains conviction for immigration purposes), *rev'd on other grounds sub nom.* Pickering v. Gonzales, 454 F.3d 525 (6th Cir. 2006), *and In re* Roldan-Santoyo, 22 I. & N. Dec. 512, 512 (B.I.A. 1999) ("[N]o effect is to be given in immigration proceedings to a state action which purports to expunge, dismiss, cancel, vacate, discharge, or otherwise remove a guilty plea or other record of guilt or conviction by operation of a state rehabilitative statute."), *vacated on other grounds sub nom.* Lujan-Armendariz v. INS, 222 F.3d 728 (9th Cir. 2000), *with In re* Rodriguez-Ruiz, 22 I. & N. Dec. 1378, 1379–80 (B.I.A. 2000) (holding conviction vacated "on the legal merits" does not constitute conviction for immigration purposes). *But see* Renteria-Gonzalez v. INS, 322 F.3d 804, 811–14 (5th Cir. 2002) (refusing to follow BIA distinction and holding conviction is valid for immigration purposes even if vacated); *Lujan-Armendariz*, 222 F.3d at 732 (refusing to follow BIA distinction for narcotics convictions). This distinction itself is often difficult to make. *See, e.g.*, Cruz-Garza v. Ashcroft, 396 F.3d 1125, 1130–31 (10th Cir. 2005) (finding authority to support postconviction relief based on both rehabilitative efforts and substantive defects in the conviction).

72 *See In re* Song, 23 I. & N. Dec. 173, 173–74 (B.I.A. 2001); *see also* Garcia-Lopez v. Ashcroft, 334 F.3d 840, 846 (9th Cir. 2003) (distinguishing between sentence modifications and expunged convictions); *In re* Cota-Vargas, 23 I. & N. Dec. 849, 850–52 (B.I.A. 2005) (using modified sentence for immigration purposes even though sentence was reduced solely to avoid immigration consequences of conviction).

73 *See, e.g.*, Sandoval v. INS, 240 F.3d 577, 582–83 (7th Cir. 2001) (resolving whether what was arguably a sentence modification allowed for postconviction relief on grounds normally used to determine if an expunged conviction allows for such relief).

who are minor participants in a crime may face when trying to obtain certain forms of relief from deportation. An LPR applying for cancellation of removal or adjustment of status may have to establish that he warrants relief as a matter of discretion.[74] Factors weighing in favor of such relief include family ties with the United States, length of residence in the country, hardship to the applicant and family if deportation occurs, service in the armed forces, employment history, property or business ties, value and service to the community, genuine rehabilitation, and evidence attesting to good moral character.[75] Factors weighing against relief include the nature and circumstances of the crime, presence of additional criminal or immigration violations, nature and recency of other violations, and other evidence indicating an applicant's bad character.[76] Moreover, as the gravity of the offense becomes more serious, the alien must demonstrate "unusual or outstanding equities," though such a showing does not compel a finding of relief.[77]

An LPR who is trying to obtain postconviction relief in the form of a private immigration bill also must overcome significant obstacles. First, private immigration legislation is not available until "all admin-

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74 INA § 240A(b)(1)(D), 8 U.S.C. § 1229b(b)(1)(D) (indicating LPR may be required to demonstrate denial of cancellation of removal would cause "exceptional and extremely unusual hardship" to the LPR's spouse, parent, or child); *id.* § 212(h), 8 U.S.C. § 1182(h) (indicating LPR may be required to establish denial of section 212(h) relief, which is necessary for an adjustment of status, would result in "extreme hardship"); *cf. In re* Marin, 16 I. & N. Dec. 581, 584 (B.I.A. 1978) ("The immigration judge must balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented in his behalf to determine whether the granting of section 212(c) relief appears in the best interests of this country."); Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, § 304(a), 110 Stat. 3009-546, 3009-594 (codified as amended at 8 U.S.C. § 1229b (2000)) (replacing section 212(c) relief with cancellation of removal).

75 *See In re Marin*, 16 I. & N. Dec. at 584–85 (discussing factors in favor of section 212(c) relief); *cf.* IIRIRA § 304(a), 8 U.S.C. § 1229b (replacing section 212(c) relief with cancellation of removal); *see also In re* Anderson, 16 I. & N. Dec. 596, 597–98 (B.I.A. 1978) (identifying similar discretionary factors for adjustment of status). *But see* Anthony Lewis, *Abroad at Home; "This Has Got Me in Some Kind of Whirlwind,"* N.Y. TIMES, Jan. 8, 2000, at A13 (noting LPRs convicted of deportable crimes may be deported regardless of how long they have lived in, and regardless of the ties and connections they have established to, this country); TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, IMMIGRATION REPORT: HOW OFTEN IS THE AGGRAVATED FELONY STATUTE USED? (2006), http://trac.syr.edu/immigration/reports/158/ (finding that of 156,713 aggravated felons placed in removal proceedings from mid-1997 until May 2006, twenty-five percent had been present in United States for twenty years or longer).

76 *In re Marin*, 16 I. & N. Dec. at 584.

77 *In re* Edwards, 20 I. & N. Dec. 191, 195 (B.I.A. 1990); *In re* Buscemi, 19 I. & N. Dec. 628, 633–34 (B.I.A. 1988). Judicial review is unavailable for the denial of any form of discretionary relief, including cancellation of removal, adjustment of status, voluntary departure, and Section 212(h) waivers of inadmissibility. 8 U.S.C. § 1252(a)(2)(B)(i) (2006).

istrative and judicial remedies are exhausted."[78] Second, the Immigration Subcommittee of the House Judiciary Committee will review "only those cases that are of such an extraordinary nature that an exception to the law is needed."[79] Finally, for an LPR convicted of a deportable crime to receive a private immigration bill, the Subcommittee must determine that legislation will "serve the best interests of the community."[80] Even if these obstacles are overcome, however, the decline in the introduction and enactment of private immigration bills prevents such legislation from being an effective incentive for cooperation by LPRs who are minor participants in a crime. In the 97th Congress (1981–1982), for example, 728 private immigration bills were introduced, of which forty-two were enacted.[81] In the 107th Congress (2001–2002), however, only eighty-five bills were introduced, of which six became laws.[82]

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78 SUBCOMM. ON IMMIGRATION, CITIZENSHIP, REFUGEES, BORDER SEC. & INT'L LAW OF THE H. COMM. ON THE JUDICIARY, 110TH CONG., RULES OF PROCEDURE AND STATEMENT OF POLICY FOR PRIVATE IMMIGRATION BILLS 3 (Comm. Print 2007).

79 *Id.*

80 *Id.* at 4.

81 U.S. DEP'T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, 2003 YEARBOOK OF IMMIGRATION STATISTICS 182 tbl.51 (2004), *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2003/2003Yearbook.pdf.

82 *Id.*; *see generally* Robert Hopper & Juan P. Osuna, *Remedies of Last Resort: Private Bills and Deferred Action*, IMMIGR. BRIEFINGS, June 1997 (comparing successful passage of private bills to "winning the jackpot in a state lottery").

Statutory relief also includes the proposed reinstatement of section 212(c) relief, INA § 212(c), 8 U.S.C. § 1182(c) (1994) (permitting LPRs who temporarily went abroad to be admitted into United States even if subject to exclusion under section 212(a) of the INA), *repealed by* Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, § 304(b), 110 Stat. 3009-546, 3009-587; Francis v. INS, 532 F.2d 268, 273 (2d Cir. 1976) (allowing section 212(c) relief for deportable aliens), and the proposed reinstatement of Judicial Recommendations Against Deportation ("JRAD"), INA § 241(b), 8 U.S.C. § 1251(b) (1988) (permitting court, within thirty days of imposing judgment or sentence, to recommend alien not be deported), *repealed by* Immigration Act of 1990, Pub. L. No. 101-649, § 505, 104 Stat. 4978, 5050; Haller v. Esperdy, 397 F.2d 211, 213 (2d Cir. 1968) (upholding JRAD as binding on INS). *See generally* Lisa R. Fine, Note, *Preventing Miscarriages of Justice: Reinstating the Use of "Judicial Recommendations Against Deportation,"* 12 GEO. IMMIGR. L.J. 491 (1998) (advocating for the reinstatement of JRADs in certain situations).

Even if reinstated, however, prior to their repeal, section 212(c) relief and JRADs were subject to the same limitations as the current forms of statutory relief. First, an alien who was convicted of one or more aggravated felonies and who had served a total of at least five years in prison was ineligible for section 212(c) relief. INA § 212(c), 8 U.S.C. § 1182(c), *repealed by* IIRIRA § 304(b). The Antiterrorism and Effective Death Penalty Act further eliminated section 212(c) relief for aliens convicted of controlled substance offenses, certain firearms offenses, multiple crimes of moral turpitude, or aggravated felonies, regardless of the time spent in prison. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(d), 110 Stat. 1214, 1277; *cf.* IIRIRA § 305 (redesignating as INA § 237 classes of deportable aliens referred to

C. Other Relief

Although this final category of relief creates an incentive for cooperation while satisfying the goals of criminal law and sentencing, plea bargaining, and ICE with regard to LPRs who are minor participants in a crime, the relief does not serve as an *effective* incentive for cooperation because of the difficulty and uncertainty in obtaining it. The category of other relief involves parole, which is a system that temporarily admits an alien into the United States on a case-by-case basis for urgent humanitarian reasons or significant public benefit.[83] Parole of a criminal informant occurs via the S-5 Visa, which authorizes admission into the country for an individual who possesses critical and reliable information concerning criminal organizations, who will supply such information to law enforcement authorities, and whose presence in the United States is essential to the successful investigation or prosecution of the individuals in the criminal organization.[84] If the S-5 Visa is awarded prior to a conviction, such relief

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in AEDPA as INA § 241). Similarly, only aliens convicted of crimes of moral turpitude were eligible for JRADs. INA § 241(b), 8 U.S.C. § 1251(b), *repealed by* Immigration Act § 505.

Second, the federal courts and BIA frequently disagreed over the application of JRADs and section 212(c) relief. One conflict related to whether a prior criminal conviction for which a JRAD had been made could be used as a justification for denying discretionary relief from deportation for a subsequent crime. *Compare* Giambanco v. INS, 531 F.2d 141, 148–49 (3d Cir. 1976) (holding that a criminal conviction with JRAD cannot support denial of subsequent discretionary relief), *with* Delgado-Chavez v. INS, 765 F.2d 868, 869 (9th Cir. 1985) (holding that a criminal conviction with JRAD can support denial of subsequent discretionary relief). Another conflict concerned the JRAD's procedural requirements relating to notice and time. *Compare* United States *ex rel.* Klonis v. Davis, 13 F.2d 630, 630 (2d Cir. 1926) (holding that the time limit in which JRAD can be made must be strictly enforced), *with* Cerujo v. INS, 570 F.2d 1323, 1327 (7th Cir. 1978) (upholding JRAD issued without notice to INS because supplying notice would have caused untimely JRAD). A final conflict relates to defining certain requirements for section 212(c) relief. *See* Kerne H.O. Matsubara, Comment, *Domicile Under Immigration and Nationality Act Section 212(c): Escaping the* Chevron *"Trap" of Agency Deference*, 82 CAL. L. REV. 1595, 1602–04 (1994) (describing the conflict between agencies and federal courts over how "domicile" was to be measured for deportable aliens); David L. McKinney, *Congressional Intent, the Supreme Court and Conflict Among the Circuits over Statutory Eligibility for Discretionary Relief Under Immigration and Naturalization Act § 212(c)*, 26 U. MIAMI INTER-AM. L. REV. 97, 105–09 (1994) (describing the conflict among the courts of appeals over defining when deportable aliens lose LPR status and thus become ineligible for section 212(c) relief).

Finally, section 212(c) relief was subject to the same discretionary balancing test obstacle that currently exists for cancellation of removal and adjustment of status. *See In re* Marin, 16 I. & N. Dec. 581, 584 (B.I.A. 1978) ("The immigration judge must balance the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented in his behalf to determine whether the granting of section 212(c) relief appears in the best interests of this country.").

83 INA § 212(d)(5)(A), 8 U.S.C. § 1182(d)(5)(A) (2000).

84 *Id.* § 101(a)(15)(S)(i), 8 U.S.C. § 1101(a)(15)(S)(i); *see also* 8 C.F.R. § 212.14 (2007) (describing the parole process). The length of stay awarded by an S Visa is three years. INA

creates an incentive for LPRs who are minor participants in a crime to cooperate because the INA's mandatory deportation requirements have not yet been triggered. Additionally, the S-5 Visa satisfies the goals of criminal law and sentencing, plea bargaining, and ICE because it allows LPRs who are minor participants in a crime to be prosecuted for the actual crimes they committed.

The S-5 Visa is not, however, an *effective* incentive for cooperation by LPRs who are minor participants in a crime because of two significant limitations. The first limitation that prevents the S-5 Visa from being an effective incentive for cooperation concerns the unavailability of the relief to many LPRs who are minor participants in a crime. Even if an LPR who is a minor participant in a crime satisfies the statutory grounds for receiving an S-5 Visa,[85] in order for the LPR to be eligible for the relief, the law enforcement agency with whom the LPR is cooperating must agree to undertake certain administrative burdens. The law enforcement agency must apply for the S-5 Visa on the LPR's behalf by filing a form with the Department of Justice's Criminal Division and specifying its reasons for seeking cooperation.[86] Additionally, the agency must agree to assume responsibility for the LPR while the LPR has the S-5 Visa.[87] Assuming such responsibility requires the law enforcement agency to maintain control and supervision of the LPR and his whereabouts and activities during the period for which the parole is authorized.[88]

The second limitation that prevents the S-5 Visa from being an effective incentive for LPRs who are minor participants in a crime to cooperate concerns the obstacles to actually obtaining the relief. A law enforcement agency's promise to apply for an S-5 Visa does not guarantee that the LPR who is a minor participant in a crime will receive the relief, because the agency itself does not award the S-5

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§ 214(k)(2), 8 U.S.C. § 1184(k)(2). Readjustment of status to LPR, however, may occur if the LPR supplied information as agreed and the information substantially contributed to a successful criminal investigation or prosecution. *Id.* § 245(j), 8 U.S.C. § 1255(j). Although readjustment is not guaranteed, when discussing the S-5 Visa, this Note refers to both the visa and a subsequent adjustment of status.

85 *See* INA § 101(a)(15)(S)(i), 8 U.S.C. § 1101(a)(15)(S)(i); *see also* 8 C.F.R. § 212.14 (discussing the procedures for making parole determinations using the S-5 Visa).

86 *See* 8 C.F.R. § 212.14(a)(1)(i)–(ii). *See generally* U.S. Citizenship & Immigration Servs., U.S. Dep't of Homeland Sec., I-854, Inter-Agency Alien and Witness Informant Record Form (2007), *available at* http://www.uscis.gov/files/form/I-854.pdf (actual form to be completed by law enforcement agency and filed with the Department of Justice's Criminal Division).

87 8 C.F.R. § 212.14(a)(1)(ii).

88 *Id.*

Visa. Instead, the DHS Under Secretary is responsible for granting S-5 Visas to criminal informants.[89] Moreover, only 200 S-5 Visas may be awarded in a given fiscal year,[90] and no fiscal year between 1995 and 2004 has seen even half of that maximum awarded.[91] Conversely, 14.4% of all criminal defendants in cases that applied the Federal Sentencing Guidelines during fiscal year 2006 received Substantial Assistance Departures.[92] Assuming the same 14.4% measure applied to the 9,947 defendants charged with aggravated felonies in Immigration Court that year,[93] 1,432 aliens would have received Substantial Assistance Departures,[94] which is far greater than the 200 S-5 Visas available as an incentive for LPRs who are minor participants in a crime to cooperate.

IV. I Once Caught a Fish "This Big": Using Temporary Alien Deportation Immunity to Catch the Sharks

A. Repeal of 28 C.F.R. § 0.197

In order to create an effective incentive for LPRs who are minor participants in a crime to cooperate with law enforcement agencies while also accounting for the purposes of criminal law and sentencing, plea bargaining, and ICE, Congress should override, or DHS should repeal, § 0.197 of Title 28 of the CFR.[95] Section 0.197 prevents prosecutors from entering binding cooperation agreements that promise

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89 *See id.* § 212.14(a)(1); *cf.* 6 U.S.C. § 251 (2000) (transferring detention and removal program functions of INS Commissioner to the DHS Under Secretary).

90 8 U.S.C. § 1184(k)(1).

91 KARMA ESTER, CONG. RESEARCH SERV., IMMIGRATION: S VISAS FOR CRIMINAL AND TERRORIST INFORMANTS 3 tbl.1 (2005), *available at* http://trac.syr.edu/immigration/library/P1621.pdf (indicating the greatest number of informants—both criminal and terrorist—admitted into the United States between fiscal years 1995 and 2004 occurred in 1996, when ninety-eight total S Visas—both S-5 and S-6 Visas—were awarded).

92 2006 STATISTICAL INFORMATION PACKET, *supra* note 5, at 11 tbl.8 (finding 10,139 sentences in 70,187 cases that occurred under the Federal Sentencing Guidelines in fiscal year 2006 involved § 5K1.1 Substantial Assistance Departures); *cf. supra* text accompanying notes 3–7 (discussing Substantial Assistance Departures in relation to the importance of cooperation).

93 TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, INDIVIDUALS CHARGED IN IMMIGRATION COURT WITH CRIMINAL VIOLATIONS FY 1992–2006, http://trac.syr.edu/immigration/reports/178/include/criminal_charges.html.

94 This author was unable to find data directly reporting on the number of aliens that received Substantial Assistance Departures in any given year.

95 Because Congress did not mandate that the INS or the Department of Justice, the agency in which the INS was located, enact § 0.197, *see* Agreements Promising Non-Deportation or Other Immigration Benefits, 61 Fed. Reg. 48,405, 48,405–06 (Sept. 13, 1996) (codified at 28 C.F.R. § 0.197 (2007)), either Congress can override, or DHS can repeal, the regulation. *Cf.* 6 U.S.C. § 251 (2000) (transferring detention and removal program functions of INS Commissioner to the DHS Under Secretary).

nondeportation without the written authorization of the DHS Under Secretary.[96] Section 0.197 thus impedes a prosecutor's ability to exercise discretion, after determining an LPR's cooperation is necessary to prosecute the major participants in the crime, when creating an incentive for LPRs who are minor participants in a crime to cooperate. Additionally, § 0.197 creates an administrative burden by delaying any cooperation law enforcement agencies may receive in exchange for a nondeportation agreement until approval by the DHS Under Secretary is granted.

Repealing § 0.197 will allow prosecutors to exercise discretion and subsequently offer temporary deportation immunity as an incentive for LPRs who are minor participants in a crime to cooperate with law enforcement agencies in prosecuting the major participants in the crime.[97] Prior to the enactment of § 0.197 in 1996,[98] courts typically upheld nondeportation plea agreements and cooperation agreements without the approval of the INS Commissioner, whose functions are now performed by the DHS Under Secretary.[99] After § 0.197 was enacted, however, at least one court refused to uphold a nondeportation agreement absent approval.[100] If § 0.197 were repealed, courts likely would uphold nondeportation agreements offered as incentives for LPRs who are minor participants in a crime to cooperate, even if the DHS Under Secretary did not approve of them.

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96 28 C.F.R. § 0.197 (2007); *cf.* 6 U.S.C. § 251 (transferring detention and removal program functions of INS Commissioner to the DHS Under Secretary).

97 Prosecutors previously have been able to obtain DHS authorization for nondeportation plea agreements. *See, e.g.*, Plea Agreement at ¶¶ 13, 16, United States v. Park, No. CR 06-819 PJH (N.D. Cal. Feb. 14, 2007) (offering an agreement by ICE, on behalf of DHS, to not seek to remove a defendant from the United States in exchange for the defendant's cooperation in an investigation of federal antitrust law violations). Repealing § 0.197, however, will likely increase the prevalence of nondeportation cooperation agreements. *See* Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131, 1161 (2002) ("The cases reveal the presence of immigration issues in plea negotiations, but they do not arise frequently today—in part because a regulation [28 C.F.R. § 0.197] now requires federal prosecutors to obtain the written consent of the INS before entering into a plea agreement that promises favorable immigration treatment.") Temporary deportation immunity can be an incentive for cooperation only if prosecutors are permitted to exercise discretion in offering nondeportation plea agreements when they deem cooperation is most necessary.

98 *See* 28 C.F.R. § 0.197.

99 *See, e.g.*, Margalli-Olvera v. INS, 43 F.3d 345, 353–54 (8th Cir. 1994) (upholding nondeportation plea agreement); Thomas v. INS, 35 F.3d 1332, 1334–35 (9th Cir. 1994) (upholding nondeportation cooperation agreement); *cf.* 6 U.S.C. § 251 (transferring detention and removal program functions of INS Commissioner to the DHS Under Secretary).

100 *See, e.g.*, United States v. Igbonwa, 120 F.3d 437, 444 (3d Cir. 1997) (refusing to uphold nondeportation agreement after § 0.197 was enacted); *see also* San Pedro v. United States, 79 F.3d 1065, 1067 (11th Cir. 1996) (refusing to uphold nondeportation agreement).

B. Temporary Deportation Immunity

Once § 0.197 is repealed, prosecutors should use temporary deportation immunity to obtain the cooperation of LPRs who are minor participants in a crime. Temporary deportation immunity is an effective incentive for cooperation that simultaneously satisfies the purposes of criminal law and sentencing, plea bargains, and ICE.

1. An Effective Incentive

Temporary deportation immunity is an effective incentive for cooperation because it overcomes the threat of the INA's extensive mandatory deportation requirements. Temporary deportation immunity consists of a preconviction agreement that prevents an LPR who is a minor participant in a crime from being deported for the LPR's role in that crime in exchange for the LPR's cooperating with law enforcement agencies by providing information about the major participants in the crime. Because temporary deportation immunity consists of a preconviction agreement, by definition, it is offered before the INA's mandatory deportation requirements may be triggered and therefore is an effective incentive for cooperation.[101] Temporary deportation immunity also is an effective incentive for cooperation because it is not limited in terms of availability, application, or obstacles to obtaining the relief.[102] Any LPR who is a minor participant in a crime is eligible for temporary deportation immunity once the prosecutor exercising discretion decides that the LPR's cooperation is necessary to prosecute the major participants in the crime.

In the hypothetical that introduced this Note, for example, the LPR who was a minor participant in the crime could be offered temporary deportation immunity in exchange for providing information about the co-conspirator who entered the bank and wounded the security guard. Because the LPR was charged with armed bank robbery and assault with a deadly weapon, convictions for either of which would trigger the INA's mandatory deportation requirements,[103] offering the LPR such relief from deportation would be an effective incentive for cooperation.

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101 *See supra* Part III.A.

102 *Cf. supra* Part III.B–C (describing limitations of postconviction and other forms of relief).

103 *See supra* note 2 and accompanying text.

2. Satisfying the Criteria for an Incentive for Cooperation

In addition to enabling law enforcement agencies to obtain cooperation in order to prosecute the major participants in a crime, temporary deportation immunity satisfies the purposes of criminal law and sentencing, plea bargaining, and ICE, because LPRs who are minor participants in a crime and who receive temporary deportation immunity still will be prosecuted for the actual crimes they committed.[104]

Temporary deportation immunity operates in accordance with the goals of criminal law and sentencing because retribution, incapacitation, deterrence, and rehabilitation can still be used to determine whether and what punishment is appropriate for the LPR who is a minor participant in a crime.[105] Although temporary deportation immunity allows an LPR who is a minor participant in a crime to avoid the immigration consequences of the crime, deportation is not considered a form of punishment:[106]

> [Deportation] is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation . . . has determined that his continuing to reside here shall depend.[107]

As such, temporary deportation immunity allows LPRs who are minor participants in a crime to avoid an immigration consequence that itself does not account for retribution, incapacitation, deterrence, or rehabilitation. Deportation is incompatible with retribution because deportation does not account for the seriousness of the offense: an alien may be deported for murder or for receiving stolen property.[108] De-

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104 *Cf. supra* Part III.A (describing preconviction relief's inability to satisfy such criteria).

105 *See supra* text accompanying notes 28–33 (describing goals of criminal law and sentencing).

106 Mahler v. Eby, 264 U.S. 32, 39 (1924); Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893). *But see, e.g.*, United States *ex rel.* Klonis v. Davis, 13 F.2d 630, 630 (2d Cir. 1926); Lupe S. Salinas, *Deportations, Removals and the 1996 Immigration Acts: A Modern Look at the Ex Post Facto Clause*, 22 B.U. INT'L L.J. 245, 261–72 (2004); Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution's Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305, 333–36 (2000). Whether deportation as an institution actually is or is not punishment is beyond the scope of this Note, which instead accepts that deportation is not punishment for purposes of this Note's proposal.

107 *Fong Yue Ting*, 149 U.S. at 730.

108 *See* INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) (2000) (providing that an alien convicted of any aggravated felony is deportable but failing to delineate between various aggravated felonies); *see also* Jennifer M. Chacon, Commentary, *Unsecured Borders: Immigra-*

portation also does not enable incapacitation, because, though a deported alien no longer can commit crimes in the United States, the alien may engage in criminal activity in other countries.[109] For a similar reason, deportation does not enable rehabilitation.[110] Finally, although deportation may deter society and a particular alien from committing a certain crime,[111] deterrence is possible only if society is aware of a particular crime's immigration consequences. This Note assumes the LPR who is a minor participant in a crime is aware of the immigration consequences of his role in that crime; however, the fact that many aliens have sought to withdraw their guilty pleas precisely because they were *unaware* of the immigration consequences of a conviction[112] undercuts the effectiveness of deportation as a deterrent.

Temporary deportation immunity also satisfies the purposes of plea bargaining, while avoiding its pitfalls, because the relief does not undermine the prosecution of the LPR who is a minor participant in a crime.[113] In cooperating with law enforcement agencies to receive temporary deportation immunity, an LPR who is a minor participant in a crime will plead guilty to his role in that crime. Temporary deportation immunity thereby allows for the more efficient allocation of resources, the alleviation of congested caseloads, and greater flexibility in the criminal justice system. The relief also allows the LPR to acknowledge guilt and manifest a willingness to assume responsibility for his actions, and it shields victims from trials. Because the LPR who receives temporary deportation immunity still will be subject to prosecution for the actual crime he committed, however, such relief does not undermine the integrity of the criminal justice system or the deterrent effect of criminal sanctions, nor does it result in overly lenient sentences.[114] Temporary deportation immunity also is unlikely to

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tion Restrictions, Crime Control and National Security, 39 CONN. L. REV. 1827, 1890 (2007) (noting that deportation as punishment does not satisfy the concerns of a retributive theory of punishment because "there is no effort to fit the punishment to the crime").

109 *See* Chacon, *supra* note 108, at 1888 ("[T]he removal of 'criminal aliens' does absolutely nothing to prevent future criminal threats.").

110 *See generally* Bill Ong Hing, *Providing a Second Chance*, 39 CONN. L. REV. 1893 (2007) (arguing for rehabilitation over deportation of immigrants).

111 *But see* Chacon, *supra* note 108, at 1884–87 (arguing that deportation is not designed to achieve deterrence when used as punishment).

112 *See supra* note 9 and accompanying text; *cf.* Castro-O'Ryan v. INS, 821 F.2d 1415, 1419 (9th Cir. 1987) (quoting E. HULL, WITHOUT JUSTICE FOR ALL 107 (1985)) (finding the INA is "second only to the Internal Revenue Code in complexity"); Lok v. INS, 548 F.2d 37, 38 (2d Cir. 1977) (finding the INA resembles "King Minos's labyrinth in ancient Crete").

113 *See supra* text accompanying notes 34–36 (describing the goals and pitfalls of plea bargaining).

114 *Cf. supra* Part III.A (describing preconviction relief's inability to avoid these pitfalls).

coerce an innocent LPR to claim he is a minor participant in a crime, because such an LPR will be unable to offer the cooperation for which temporary deportation immunity is an incentive in the first place.

Finally, temporary deportation immunity satisfies the goals of ICE because the relief upholds public safety and protects America.[115] Temporary deportation immunity provides an opportunity for law enforcement agencies to prosecute the major participants in a crime in addition to prosecuting the LPR who is a minor participant in the crime. Although the LPR who is a minor participant in a crime eventually will be released into society because of the relief, at least one study has found that deportable aliens are no more a threat to public safety than are nondeportable aliens.[116] Because temporary deportation immunity calls for an LPR who is a minor participant in a crime to be prosecuted (and thus sentenced) for the actual crime committed, the relief prevents the LPR from creating any "vulnerabilities that pose a threat to our nation's borders" for a longer period of time.[117]

Temporary deportation immunity also accounts for the goals of ICE because the relief promotes the "efficient and effective enforcement of the immigration laws and the interests of justice."[118] ICE allows its officers to choose not to prosecute a particular case "if the Federal immigration enforcement interest that would be served by prosecution is not substantial."[119] A favorable exercise of discretion depends on factors such as an alien's immigration status, length of residence in the country, criminal history, humanitarian concerns, and *current or past cooperation* with law enforcement agencies.[120] Temporary deportation immunity allows the prosecutor who is most aware of an LPR's cooperation to be the individual exercising discretion when determining whether the LPR who is a minor participant in a crime is entitled to relief.

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115 *See supra* text accompanying notes 37–39 (describing the goals of ICE).

116 *See* Laura J. Hickman & Marika J. Suttorp, *Are Deportable Aliens a Unique Threat to Public Safety?: Comparing the Recidivism of Deportable and Nondeportable Aliens*, 7 CRIMINOLOGY & PUB. POL'Y 59, 77 (2008) (finding no difference in terms of occurrence, frequency, or timing in the rearrest rates of deportable and nondeportable aliens in Los Angeles County over a thirty-day period); *see also* Press Release, RAND Corp., Recidivism No Higher Among Deportable Immigrants than Similar Nondeportable Immigrants (Feb. 22, 2008), *available at* http://www.rand.org/news/press/2008/02/22/index1.html (reporting the same).

117 2006 ICE REPORT, *supra* note 37, at 2.

118 Meissner Memorandum, *supra* note 38, at 1; *see supra* text accompanying notes 37–39 (describing the goals of ICE).

119 Meissner Memorandum, *supra* note 38, at 5.

120 *Id.* at 7–8.

In the hypothetical that introduced this Note, the LPR who was a minor participant in the crime was charged with armed bank robbery and assault with a deadly weapon. Offering the LPR temporary deportation immunity accounts for the goals of criminal law and sentencing, plea bargaining, and ICE, because the LPR who was a minor participant in the crime will still be prosecuted for armed bank robbery and assault with a deadly weapon. Moreover, temporary deportation immunity will allow the United States Attorney's Office to prosecute the major participant in the crime in addition to prosecuting the LPR who is a minor participant.

C. Limitations of Temporary Deportation Immunity

There are two limitations of temporary deportation immunity that are noteworthy. Despite these limitations, however, the relief remains an effective incentive for cooperation that simultaneously satisfies the purposes of criminal law and sentencing, plea bargaining, and ICE with regard to an LPR who is a minor participant in a crime.

The first limitation of temporary deportation immunity is that the relief may not actually serve as an incentive for an LPR who is a minor participant in a crime to cooperate if the LPR faces the death penalty or life imprisonment if convicted. In the hypothetical that introduced this Note, for example, if the bank security guard were killed during the robbery, instead of merely wounded, the LPR who was a minor participant in the crime would be charged with armed bank robbery and felony murder. Felony murder carries a punishment of death or life imprisonment.[121] Although temporary deportation immunity would allow the LPR who was a minor participant in the crime to avoid deportation, the LPR may refuse to cooperate with law enforcement agencies because the LPR would face the death penalty or a life sentence.[122] Nevertheless, temporary deportation remains an effective incentive for cooperation by an LPR who is a minor participant in a crime, because most crimes carry a punishment other than life imprisonment or the death penalty.

The second limitation of temporary deportation immunity is that the relief may implicate the "cooperation paradox." The cooperation paradox holds that the defendants who have the most "substantial as-

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121 18 U.S.C. § 1111(b) (2000).

122 Instead, an LPR in such a situation likely will seek to plead guilty to a lesser charge in exchange for a reduced sentence, or the LPR will try to enter into a plea agreement for a lesser sentence on the condition that the LPR stipulate to the entry of a judicial order of deportation. *See* INA § 238(c)(5), 8 U.S.C. § 1228(c)(5) (2000); FED. R. CRIM. P. 11.

sistance" to offer are those who are more centrally involved in conspiratorial crimes.[123] As such, the minor participants with little knowledge or responsibility have little assistance to offer and can wind up with more severe sentences than the major participants who are in the best place to negotiate large sentencing breaks.[124] In the hypothetical that introduced this Note, for example, if the LPR who was a minor participant in a crime were unaware that his co-conspirator had a gun, the LPR may be unable to actually offer cooperation in the prosecution of the major participant in the crime. Nevertheless, temporary deportation immunity remains an effective incentive for cooperation, because the relief would be offered only if an LPR who is a minor participant in a crime is able to provide valuable information in the prosecution of the major participants. Temporary deportation immunity would not be available to the major participant in the crime despite that major participant's ability to provide more "substantial assistance."

Conclusion

Because the mandatory deportation requirements that accompany criminal convictions discourage LPRs who are minor participants in a crime from cooperating with law enforcement agencies, an incentive for cooperation is needed. Such an incentive should account for the purposes of criminal law and sentencing, plea bargaining, and ICE, which form the structure within which the criminal justice system and immigration law operate. Existing incentives for cooperation by LPRs who are minor participants in a crime are based on the forms of relief by which an alien may avoid deportation. The incentives, however, either do not satisfy the goals of criminal law and sentencing, plea bargaining, and ICE, or they are ineffective at obtaining cooperation. To address this problem, Congress should override, or DHS should repeal, § 0.197 of Title 28 of the CFR, and prosecutors should

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123 Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 212 (1993). *But see* MAXFIELD & KRAMER, *supra* note 6, at 13 ("The oft-cited 'truth' that drug conspiracy members at the top of the organization are more likely to secure reduced sentences due to substantial assistance than those lower in the criminal organization is not supported by these exploratory data.").

124 *See, e.g.*, United States v. Brigham, 977 F.2d 317, 318–20 (7th Cir. 1992) (upholding the significantly longer sentence for a lookout in a drug deal even though the actual participants in the deal received reduced sentences for cooperating with authorities); United States v. Evans, 970 F.2d 663, 676 (10th Cir. 1992) (upholding harsh sentences for participants in a drug ring even though a key figure in the ring was given immunity for cooperating with authorities).

offer temporary deportation immunity as an incentive for LPRs who are minor participants in a crime to cooperate.

The LPR who was a minor participant in the crime in the hypothetical that introduced this Note was charged with armed bank robbery and assault with a deadly weapon, a conviction for either of which would trigger the INA's mandatory deportation requirements. As such, the LPR refused to cooperate with the United States Attorney's Office and provide information about his co-conspirator who actually entered the bank and wounded the security guard who tried to stop the robbery. If temporary deportation immunity were used, however, prosecutors could have created an effective incentive for the LPR who was a minor participant in the bank robbery to cooperate. Additionally, by offering temporary deportation immunity, prosecutors would have accounted for the underlying purposes of criminal law and sentencing, plea bargaining, and ICE, because the relief would have enabled the United States Attorney's Office to prosecute both the major participant in the crime in addition to the LPR who was the minor participant.