



A PROBLEM OF PROOF:  
HOW ROUTINE DESTRUCTION OF COURT  
RECORDS ROUTINELY DESTROYS  
A STATUTORY REMEDY

Cody Harris

COMMENT

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\* Cody Harris, J.D. Candidate, Stanford Law School, Class of 2007. The author wishes to thank Professors Mariano-Florentino Cuellar and George Fisher for their helpful comments about the topic. The author also expresses his heartfelt thanks to his wife, Katherine, for being supportive even as he worked on this Comment while cruising down the Nile.

## INTRODUCTION

Imagine the following scenario. Smith invites Jones to live as a boarder in his spacious home upon the condition that Jones will pay his share, keep up his end of the chores, and abide by the rules of the household. Jones is thrilled to have found such a nice place to live and signs the lease without a moment's hesitation. For a time, things go well; domestic affairs run smoothly. Then, one day, Jones steals the toaster oven from the kitchen and sells it for some extra cash. Smith wakes up the next morning hungry for a toasted English muffin only to find the appliance gone. He calls a house meeting where he confronts Jones, but Jones is evasive. Smith tells him that if he confesses to the theft, he will simply have to pay back the household for the toaster. Eventually, Jones confesses and buys a new toaster oven for the house. Time passes, and although things in the house are tense for a while after Jones's indiscretion, he goes on to become a model housemate. When he gets married, his new wife moves into the house with Smith's blessing. They have a baby girl, and Jones adds a nursery to the east wing of the house at his own expense.

Twelve years later, on a Tuesday afternoon like any other, Smith calls a house meeting. He tells Jones politely but firmly that he is being kicked out of the house. Caught off guard and with nowhere else to go, Jones asks what he has done to deserve eviction. Smith asks Jones if he remembers the toaster he swiped a dozen years ago. Jones says he does, but only vaguely. "I told you at the time that you had violated the house rules and it was grounds for eviction," says Smith. "I've let this slide for a while because I've been busy. But time's up. Be out by Friday." Jones says he doesn't recall hearing about that provision of the lease, and, had he known, he never would have admitted to the theft. Smith admits that while he doesn't recall exactly what he told Jones at the house meeting, he is sure he would have reminded Jones about the possibility of eviction. In any case, he says, it doesn't matter. The lease says what it says and Jones must get out. His wife and kids, however, have done nothing wrong and can stay if they wish, although Jones will never be allowed past the driveway, even for a visit. Desperate for a reprieve, Jones remembers that Smith takes meticulous notes of house meetings, in case of future legal troubles. "Let's see the notes from twelve years ago!" he shouts. "If you didn't tell me about this eviction business, I should get to stay." Smith responds, "That's a fine idea, but be serious. I can't be expected to keep notes for so long. I shredded them last August." As Jones takes in the gravity of his situation, Smith calls the house meeting to a close. "I feel for you, Jones. But you just don't steal your landlord's toaster."

Simplified as it may be, the above scenario fairly depicts the state of many criminal deportations under current U.S. immigration law. Of course, there is nothing novel or surprising about the fact that states deport noncitizens who have committed crimes. Criminal deportation has legitimate justifications including deterrence, retribution, incapacitation, and even a desire to bolster

public support for immigration more generally.<sup>1</sup> But theory is different from practice. In practical application, significant problems and inefficiencies arise as the immigration system interacts with the criminal justice system. Indeed, in discussing the two bureaucracies some observers have noted wryly, “One system is profoundly troubled; the other is a disaster. Criminal defense lawyers and immigration attorneys might disagree about which system deserves which label.”<sup>2</sup>

Problems in the two systems affect an increasing number of people; the sheer number of criminal deportations has exploded in the past two decades. In 1980, fewer than 500 of an estimated 31,000 deportable noncitizens were actually removed from the United States on criminal grounds.<sup>3</sup> By 2001, this number reached approximately 70,000.<sup>4</sup> After the attacks of September 11, 2001, the efficiency of the deportation system has become a renewed priority. With the passage of the USA PATRIOT Act and the reorganization of the Immigration and Naturalization Service (INS) into Immigration and Customs Enforcement (ICE), the number of criminal deportations is expected to rise further.<sup>5</sup> Indeed, according to the U.S. Department of Homeland Security, 89,406 criminal aliens were deported in 2005, seventy-seven percent of whom were returned to Mexico.<sup>6</sup> As the figures grow, however, it is important to remember that each deportation has life-changing implications for the individual immigrant and, in many cases, his family. It is therefore imperative that the system function fairly as well as efficiently.

A complete catalogue of the problems inherent in the criminal alien deportation system is beyond the scope of this Comment, which will focus on one relatively overlooked aspect of the system: statutory requirements to warn noncitizen criminal defendants of the immigration consequences of their crimes before the acceptance of a guilty plea. Although neither the U.S. Constitution nor the Federal Rules of Criminal Procedure require such a warning,<sup>7</sup> California, along with twenty other states, has enacted a law requiring state

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1. See Robert A. Mikos, *Enforcing State Law in Congress's Shadow*, 90 CORNELL L. REV. 1411, 1448 (2005).

2. Margaret H. Taylor & Ronald F. Wright, *The Sentencing Judge as Immigration Judge*, 51 EMORY L.J. 1131, 1131 (2002).

3. *Id.* at 1135.

4. *Id.* at 1136.

5. See John J. Francis, *Failure to Advise Noncitizens of Immigration Consequences of Criminal Convictions: Should This Be Grounds to Withdraw a Guilty Plea?*, 36 U. MICH. J.L. REFORM 691, 705-06 (2003).

6. See MARY DOUGHERTY ET AL., U.S. DEP'T OF HOMELAND SEC., IMMIGRATION ENFORCEMENT ACTIONS: 2005, at 5 tbl. 3 (2006), available at [http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/Enforcement\\_AR\\_05.pdf](http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/Enforcement_AR_05.pdf).

7. While Rule 11 of the Federal Rules of Criminal Procedure requires the court to ensure that a defendant's plea is knowing and voluntary, federal courts have uniformly rejected the proposition that the rule requires a sentencing judge to inform the defendant of the immigration consequences of his plea. See *infra* notes 51-52 and accompanying text.

courts to inform noncitizen defendants that a guilty plea may subject them to adverse immigration consequences such as deportation, exclusion, and denial of naturalization.<sup>8</sup> This Comment will examine how this statute, section 1016.5 of the California Penal Code, operates in practice.

Part I will briefly lay out the history of federal criminal deportation laws, emphasizing the increasingly harsh immigration consequences of criminal convictions for noncitizens. Part II will explain the origins, purpose, and basic requirements of California's Penal Code section 1016.5. Part III will explore how California courts have interpreted section 1016.5. In particular, this section will focus on the unfortunate interaction between Penal Code section 1016.5 and an obscure provision of the California Government Code, section 68152, which provides for the routine destruction of court reporter transcripts after a period of ten years. The result is a serious evidentiary problem that chips away at a system already notorious for the harshness of its penalties and the dwindling options for relief. Part IV will present the case for reforming the legal regime surrounding section 1016.5 and offer suggestions for improvement.

#### I. A BRIEF OVERVIEW OF CRIMINAL DEPORTATION IN THE UNITED STATES

To place California's statutory regime in context, this Part will chronicle the history, evolution, and purposes of federal immigration law as it pertains to criminal deportation. Criminal deportation in the United States reaches back to the nation's inception and is embedded in international customary law. Over time, haphazard congressional attempts to deport criminal aliens have evolved into an efficient and sophisticated system with few exceptions and fewer options for relief.

##### A. *The Evolution of American Deportation Law*

The right of the United States government to deport aliens who have committed criminal acts inside U.S. territory has a long and essentially unchallenged pedigree.<sup>9</sup> Early laws focused on the exclusion of certain aliens from the United States, a practice the Supreme Court formally endorsed by upholding the Chinese Exclusion Act in *Chae Chan Ping v. United States* in 1889.<sup>10</sup> Congress soon turned its attention to deportation and applied the practice more broadly.<sup>11</sup> But deportation did not become firmly embedded in

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8. CAL. PENAL CODE § 1016.5 (2007).

9. For a discussion of the early roots of American immigration law, see JANE PERRY CLARK, *DEPORTATION OF ALIENS FROM THE UNITED STATES TO EUROPE* 33-41 (1931).

10. *Chae Chan Ping v. United States*, 130 U.S. 581, 603 (1889) (characterizing the ability to exclude aliens as "an incident of every independent nation").

11. For example, in 1891 Congress authorized the deportation of any alien who "within one year after their arrival, became public charges from causes existing prior to

the legal fabric of American law until the Supreme Court decided *Fong Yue Ting v. United States* in 1893.<sup>12</sup> In that case, the Court upheld a law allowing the deportation of any Chinese laborer who had failed to obtain a certificate of registration within a year of arrival. A majority of the Court held that “[t]he right to exclude or to expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, [is] an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence and its welfare . . . .”<sup>13</sup>

Congress attempted to make a coherent whole out of its previous piecemeal efforts at immigration law in the Immigration Act of 1917, marking the beginning of the merger between state criminal law and federal deportation law that remains with us today. The law allowed for the deportation of “any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed at any time after entry.”<sup>14</sup> The Act expanded the list of deportable aliens to include anarchists and those advocating the overthrow of the U.S. government. Narcotics violations, now the primary driver of criminal deportation proceedings,<sup>15</sup> were added to the list of deportable offenses in 1931. The law allowed deportation of “any alien except an addict, if not a dealer or peddler who shall violate or conspire to violate” any federal narcotics law regarding “opium, coca leaves, [and] heroin.”<sup>16</sup>

At about the same time, criminal alien deportation began to enter into public political discourse, and local governments started to make deporting criminal aliens a priority. President Hoover used his message to Congress on December 2, 1930 to call for “strengthening our deportation laws so as to more

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landing.” See CLARK, *supra* note 9, at 44.

12. 149 U.S. 698 (1893).

13. *Id.* at 711. The *Fong Yue Ting* Court, however, divided bitterly over the outcome of the case. The majority asserted that “[t]he order of deportation is not a punishment for crime” and that the procedural protections of the Constitution therefore had no application. *Id.* at 730. Justice Brewer dissented, arguing, “Every one knows that to be forcibly taken away from home and family and friends and business and property, and sent across the ocean to a distant land, is punishment, and that oftentimes most severe and cruel.” *Id.* at 740 (Brewer, J., dissenting). In this way, *Fong Yue Ting* presaged a fundamental disagreement about deportation that still haunts us today in the debate over whether deportation is a “direct” or “collateral” consequence of a criminal conviction. See *infra* notes 66-70 and accompanying text.

14. CLARK, *supra* note 9, at 56 (citations omitted). Ironically, the term “moral turpitude,” which remains part of immigration law today, first appeared as part of an exemption from exclusion laws for victims of political persecution, whose crimes may have been designated as crimes of moral turpitude by the immigrant’s home country. Hence, the term was first used in American law to protect aliens from unfair exclusion. See *id.* at 44 n.4.

15. “Dangerous drug” offenses accounted for 37.4% of criminal deportations in 2005. See DOUGHERTY, *supra* note 6, at 5 tbl.4.

16. CLARK, *supra* note 9, at 68 (citations omitted). For a more complete history of the early evolution of narcotics deportation legislation, see *id.* at 243-46.

fully rid ourselves of criminal aliens.”<sup>17</sup> Late that same year, New York City added a special bureau to its police department “to round up and investigate all aliens with criminal records to establish possible grounds for deportation.”<sup>18</sup> The bureau’s work was in part “retroactive,” turning over information about criminal aliens “charged with felonies during the past five years” to the U.S. Immigration Commission for action.<sup>19</sup>

### B. Modern Trends in Criminal Deportation

Congress passed the Immigration and Nationality Act (INA) in 1952, setting up a statutory framework for the exclusion, admission, and removal of aliens that forms the basis of today’s immigration law.<sup>20</sup> The sweeping purpose of the law was “to enact a comprehensive, revised immigration, naturalization, and nationality code.”<sup>21</sup> Echoing the Supreme Court’s decisions in *Chae Chan Ping* and *Fong Yue Ting*, Congress explained that “[i]t has been repeatedly held that the right to exclude or to expel all aliens or any class of aliens, absolutely or upon certain conditions, in war or in peace, is an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence, and its welfare.”<sup>22</sup>

Under the original INA, any crime of “moral turpitude” (a term not defined in the Act) could lead to deportation if it led to imprisonment for a year or more and occurred within five years of admission.<sup>23</sup> Two such convictions committed at any time after admission would also lead to deportation.<sup>24</sup> Over the decades, the INA’s prohibition on criminal aliens has expanded dramatically. In 1988, the Act was amended to reach aliens convicted of an “aggravated felony,” a term which has also expanded over time.<sup>25</sup> What first applied to murder, drug trafficking, and weapons trafficking has expanded to include money laundering, child pornography, and a multitude of other “crimes of violence.”<sup>26</sup>

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17. *Id.* at 163.

18. *Police to Round Up Criminal Aliens Here; New Bureau to Get Evidence for Mulrooney*, N.Y. TIMES, Dec. 20, 1930, at 1.

19. *Id.*

20. Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, 66 Stat. 163.

21. H.R. REP. NO. 82-1365 (1952), reprinted in 1952 U.S.C.C.A.N. 1653, 1653.

22. *Id.* at 1654.

23. INA § 241(a)(4).

24. *Id.*

25. The criminal deportation provisions of INA in its current form are codified at 8 U.S.C. § 1227(a)(2) (2007).

26. See *id.*; see also Sara A. Rodriguez, *Exile and the Not-So-Lawful Permanent Resident: Does International Law Require a Humanitarian Waiver of Deportation for the Noncitizen Convicted of Certain Crimes?*, 20 GEO. IMMIGR. L.J. 483, 489-90 (2006).

The most dramatic expansion of the INA occurred in 1996 with the passage of the Antiterrorism and Effective Death Penalty Act (AEDPA)<sup>27</sup> and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA).<sup>28</sup> These recent developments are well documented.<sup>29</sup> Suffice it to say that the immigration consequences for a wide variety of criminal offenses have become extremely harsh, with very little possibility of relief. The list of “aggravated felonies” includes many garden variety state law crimes, including theft and domestic violence charges.<sup>30</sup> Any drug conviction renders an alien deportable, with the sole exception of “a single offense involving possession for one’s own use of 30 grams or less of marijuana.”<sup>31</sup> A suspended sentence counts as a term of imprisonment and renders the convicted alien deportable, even if the alien never serves a moment of his sentence.<sup>32</sup> But the most striking feature of modern immigration law is the near total elimination of discretionary relief for aliens convicted of aggravated felonies.<sup>33</sup> The result is that “[d]eportation is virtually assured following conviction for an aggravated felony because aggravated felons are precluded from seeking almost every form of discretionary relief, such as cancellation of removal.”<sup>34</sup>

In sum, criminal deportation in the United States has seen a steady expansion from simple exclusion to the rise of a highly effective system devoted to the removal of nearly 100,000 criminal aliens from our shores each year. As these numbers grow and the avenues for relief dwindle, it is hardly an uncommon view that “the sharp rise in criminal deportations over the last two decades has come at the expense of substantive and procedural fairness in the removal process.”<sup>35</sup> Given the lack of options for relief at the federal level, the search for a release valve inevitably focuses on state criminal proceedings.

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27. Pub. L. No. 104-132, 110 Stat. 1214 (1996).

28. Pub. L. No. 104-208, 110 Stat. 3009 (1996).

29. *See, e.g.*, Francis, *supra* note 5, at 697-705; Rodriguez, *supra* note 26, at 491-95; Taylor & Wright, *supra* note 2, at 1136-39.

30. *See* 8 U.S.C. § 1101(a)(43) (2007) (defining “aggravated felony”); *INS v. St. Cyr*, 533 U.S. 289, 295-96 n.4 (2001) (listing ways in which the term “aggravated felony” was “broadened substantially by IIRIRA”); *see also* Francis, *supra* note 5, at 701 (noting that “offenses classified as misdemeanors or violations in state penal codes can be classified as aggravated felonies under the INA”). Notably, however, the Supreme Court recently applied something of a break to the ever-expanding definition of “aggravated felony,” which carries with it the ever-shrinking availability of discretionary relief. In December 2006, an 8-1 majority of the Court held that a drug trafficking violation classified as a felony under state law but a misdemeanor under the Controlled Substances Act could not qualify as an “aggravated felony” as defined in the INA. *See Lopez v. Gonzales*, 127 S. Ct. 625 (2006).

31. 8 U.S.C. § 1227(a)(2)(B)(i) (2007).

32. *See id.* § 1101(a)(48)(B).

33. *See id.* § 1229b(a)(3) (rendering noncitizens convicted of aggravated felonies ineligible for cancellation of removal). The only form of relief remaining would be a pardon from a state governor, or from the President for a federal crime. *See id.* § 1227(a)(2)(A)(vi).

34. Mikos, *supra* note 1, at 1447.

35. Taylor & Wright, *supra* note 2, at 1138.



Indeed, one observer has noted, “The state provides an alien who is suspected of committing a deportable offense her best, and perhaps only, hope of avoiding deportation.”<sup>36</sup> As the following Parts of this Comment will show, states have, in fact, filled this role to some extent, with California leading the way.

## II. CALIFORNIA PENAL CODE SECTION 1016.5

In 1970, Jose Giron, a Lawful Permanent Resident of the United States and a citizen of El Salvador, pled guilty to a charge of possessing marijuana in a California state court and received three years probation.<sup>37</sup> A year later, the INS initiated deportation proceedings based on the conviction. Giron asked the court to vacate his plea because, he alleged, no one involved knew that the plea would render him deportable.<sup>38</sup> The court granted his motion and allowed him to withdraw his plea.

When Giron’s case reached the California Supreme Court in 1974, the question was whether the superior court had the discretion to vacate the plea. Distinguishing Giron’s case from one in which a defendant “enters a guilty plea hoping for leniency which is not forthcoming,” the court held that a judge has discretion to allow a defendant to withdraw a plea “when he thereafter discovers that much more serious sanctions, whether criminal or civil, direct or consequential, may be imposed.”<sup>39</sup> The court emphasized the limits of its holding, stating, “We do not deem the thrust of the argument to be that Giron was entitled as a matter of right to be advised of such collateral consequences prior to the acceptance of his plea nor do we so hold.”<sup>40</sup> Further, the court cautioned that it would “not necessarily conclude that a court abused its discretion if it either granted or denied a motion to set aside a plea of guilty on evidence that an accused was or was not aware of the possibility of deportation.”<sup>41</sup>

The California legislature reacted quickly to *Giron*, passing California Penal Code section 1016.5 in 1978. The bill’s author, Senator Alex Garcia, explained, “[T]his bill is primarily designed to assure that lawful aliens . . . are made fully aware of the consequences of [their] plea.”<sup>42</sup> The law states:

Prior to accepting a plea of guilty or nolo contendere to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall administer the following

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36. Mikos, *supra* note 1, at 1451.

37. *People v. Superior Court (Giron)*, 523 P.2d 636, 637 (Cal. 1974).

38. *Id.* at 638.

39. *Id.* at 639.

40. *Id.*

41. *Id.*

42. *In re Resendiz*, 19 P.3d 1171, 1192 (Cal. 2001) (Brown, J., concurring and dissenting) (citation omitted) (alteration in original).

advisement on the record to the defendant: If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.<sup>43</sup>

Section 1016.5 provides a robust and straightforward remedy for a court's failure to provide the proper advice:

If . . . the court fails to advise the defendant as required by this section and the defendant shows that conviction of the offense to which defendant pleaded guilty or nolo contendere may have the consequences for the defendant of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States, the court, on defendant's motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty or nolo contendere, and enter a plea of not guilty.<sup>44</sup>

Importantly, the drafters foresaw possible problems of proof and included the command that “[a]bsent a record that the court provided the advisement required by this section, the defendant shall be presumed not to have received the required advisement.”<sup>45</sup> The legislature included a declaration of purpose in the text of the law, stating that it was the intent of the legislature to “promote fairness” to the many noncitizens it found were entering guilty pleas without knowing the immigration consequences of their decisions.<sup>46</sup>

California's law “was the first of its kind and has served as a national model.”<sup>47</sup> Over the past thirty years, the idea has spread across the nation; twenty-one jurisdictions now require a similar warning.<sup>48</sup> And at least six of the states that require a specific admonition have adopted California's warning “practically verbatim.”<sup>49</sup> While state legislatures have required such warnings,

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43. CAL. PENAL CODE § 1016.5(a) (2007).

44. *Id.* § 1016.5(b).

45. *Id.*

46. *Id.* § 1016.5(d).

47. *Resendiz*, 19 P.3d at 1196 (Brown, J., concurring and dissenting).

48. *See* ARIZ. R. CRIM. P. 17.2(f); CONN. GEN. STAT. § 54-1j(a) (2007); D.C. CODE § 16-713(a) (2007); FLA. R. CRIM. P. 3.172(c)(8); GA. CODE § 17-7-93(c) (2007); HAW. R. PENAL P. 11(c)(5); MD. R. 4-242(e); MASS. R. CRIM. P. 12(c)(3)(C); MINN. R. CRIM. P. 15.01(10)(d); MONT. CODE § 46-12-210(1)(f) (2007); N.M. R. CRIM. P. 5-303(F)(5); N.Y. CRIM. PROC. LAW § 220.50(7) (2007); N.C. GEN. STAT. § 15A-1022(a)(7) (2007); OHIO REV. CODE § 2943.031(A) (2007); OR. REV. STAT. § 135.385(2)(d) (2007); R.I. GEN. LAWS § 12-12-22(b) (2007); TEX. CODE CRIM. PROC. art. 26.13(a)(4) (2007); VT. STAT. tit. 13, § 6565(c)(1) (2007); WASH. REV. CODE § 10.40.200(2) (2007); WIS. STAT. § 971.08(1)(c) (2007).

49. *Resendiz*, 19 P.3d at 1196 n.3 (Brown, J., concurring and dissenting). New York's statute is a notable exception. Under section 220.50(7) of the New York Code of Criminal Procedure, a court's failure to advise is “not [to] be deemed to affect the voluntariness of a plea of guilty or the validity of a conviction,” rendering the statute a right without a remedy. N.Y. CRIM. PROC. LAW § 220.50(7) (2007); *see also* *People v. McDonald*, 745 N.Y.S.D.2d 276 (App. Div. 2002), *aff'd*, 802 N.E.2d 131 (N.Y. 2003) (affirming conviction in spite of

there exists no similar requirement in the Federal Rules. Federal courts have uniformly rejected the necessity of a warning because deportation is generally considered a “collateral” consequence of a conviction, not a “direct” consequence, and only the former are required in order for a plea to be considered knowingly, intelligently, and voluntarily given.<sup>50</sup> Rule 11 of the Federal Rules of Criminal Procedure, which governs the acceptance of pleas, makes no mention of immigration consequences and has been interpreted only to require informing defendants of the direct consequences of their pleas, such as the maximum sentence allowed, recidivist provisions, and loss of parole.<sup>51</sup> Federal and state courts have widely held that defendants need not be informed of the immigration consequences of their pleas because deportation “[is] not the sentence of the court which accepted the plea but of another agency over which the trial judge has no control and for which he has no responsibility.”<sup>52</sup> Courts are also weary of a “floodgate” problem, fearing that “[t]he collateral consequences flowing from a plea of guilty are so manifold that any rule requiring a district judge to advise a defendant of such a consequence as that here involved would impose an unmanageable burden on the trial judge and ‘only sow the seeds for later collateral attack.’”<sup>53</sup> Although the seriousness of deportation and its virtual certainty following conviction has led some commentators to call for a recognition that deportation is no longer “collateral,”

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court’s failure to advise, along with defense lawyer’s and District Attorney’s affirmative misrepresentations about immigration consequences of conviction).

50. *See, e.g.*, *United States v. Banda*, 1 F.3d 354, 356 (5th Cir. 1993); *Varela v. Kaiser*, 976 F.2d 1357, 1358 (10th Cir. 1992); *United States v. Del Rosario*, 902 F.2d 55, 57-58 (D.C. Cir. 1990); *United States v. DeFreitas*, 865 F.2d 80, 82 (4th Cir. 1989) (citing *United States v. Santelises*, 509 F.2d 703, 704 (2d Cir. 1975)); *United States v. George*, 869 F.2d 333, 337 (7th Cir. 1989); *Santos v. Kolb*, 880 F.2d 941, 944-45 (7th Cir. 1989); *United States v. Quin*, 836 F.2d 654, 655-56 (1st Cir. 1988); *United States v. Yearwood*, 863 F.2d 6, 7-8 (4th Cir. 1988); *United States v. Gavilan*, 761 F.2d 226, 228-29 (5th Cir. 1985); *United States v. Campbell*, 778 F.2d 764, 769 (11th Cir. 1985); Jamie Ostroff, *Are Immigration Consequences of a Criminal Conviction Still Collateral? How the California Supreme Court’s Decision In Re Resendiz Leaves this Question Unanswered*, 32 SW. U. L. REV. 359, 363 n.33 (2003) (listing federal and state cases); *see also Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (stating that neither the Constitution nor Rule 11 of the Federal Rules of Criminal Procedure requires a defendant to be informed of parole eligibility, a collateral consequence of a conviction, for a plea to be considered valid).

51. *See* FED. R. CRIM. P. 11; *see also Fruchtman v. Kenton*, 531 F.2d 946, 949 (9th Cir. 1976) (listing direct consequences).

52. *Fruchtman*, 531 F.2d at 949 (quoting *Michel v. United States*, 507 F.2d 461, 465 (2d Cir. 1974)); *see also United States v. Santelises*, 509 F.2d 703, 704 (2d Cir. 1975); *Michel*, 507 F.2d at 464-65; *United States v. Sambro*, 454 F.2d 918, 922 (D.C. Cir. 1971), *aff’d*, 454 F.2d 924 (D.C. Cir. 1971) (en banc) (per curiam). *But see United States v. Briscoe*, 432 F.2d 1351, 1353 (D.C. Cir. 1970) (holding that “[u]nder appropriate circumstances the fact that a defendant has been misled as to [sic] consequence of deportability may render his guilty plea subject to attack”).

53. *Fruchtman*, 531 F.2d at 949 (quoting *United States v. Sherman*, 474 F.2d 303, 305 (9th Cir. 1973)).

the distinction remains firmly embedded in the legal landscape.<sup>54</sup> This gap in the federal rules makes a state statute like California's section 1016.5 a vital safety valve in the criminal deportation system.

### III. CALIFORNIA PENAL CODE SECTION 1016.5 IN PRACTICE

Although the text of section 1016.5 is straightforward, it has spawned a significant amount of litigation as defendants desperate to avoid deportation have forced courts to struggle with various interpretive issues lurking beneath the text. The most significant questions have focused on whether or not a defendant must show prejudice to prevail, timeliness, appealability, and ineffective assistance of counsel claims. The California Supreme Court has addressed these issues in a series of recent cases. However, one issue has so far escaped notice. What happens when the only hard evidence of a section 1016.5 warning is missing—because the state itself destroyed the relevant court records?

#### A. Recent California Supreme Court Cases Interpreting Section 1016.5

The California Supreme Court first outlined its basic interpretation of section 1016.5 in *People v. Superior Court (Zamudio)*.<sup>55</sup> There, the court held that although the statute commands that a court “shall” vacate the judgment in the event of failure to advise, a defendant must show prejudice in order to obtain relief.<sup>56</sup> Specifically, a defendant seeking to withdraw his plea under section 1016.5 must show that it is “reasonably probable” that had he received the proper warnings, he would not have pled guilty or no contest.<sup>57</sup> This holding prompted a vigorous dissent from Justice Mosk, who argued that in enacting section 1016.5 the legislature had “determined that it would be a miscarriage of justice for the erroneously entered plea to stand if the result is possible banishment from the United States.”<sup>58</sup> The *Zamudio* court also explained that although the statute provides for three distinct warnings (relating to deportation, exclusion, and denial of naturalization), “substantial compliance” is acceptable, so long as the court warns a defendant of the immigration possibilities “pertinent to his situation.”<sup>59</sup> *Zamudio* also established that while a defendant must exercise “reasonable diligence” in bringing a section 1016.5 motion, a lengthy period of time can pass between

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54. See Francis, *supra* note 5. But see Ostroff, *supra* note 50, at 381 (“Deportation is not an element of the sentence imposed by the trial judge accepting the defendant’s plea, and the 1996 passage of IIRAIRA has in no way altered this fact.”).

55. 999 P.2d 686 (Cal. 2000).

56. *Id.* at 696-97.

57. *Id.* at 703.

58. *Id.* at 705 n.1 (Mosk, J., dissenting).

59. See *id.* at 702.

the entry of a guilty plea and a defendant's motion to vacate his conviction. The court held that the statute "contains no time bar," and it "would be unfair" to expect a defendant to object to inadequate immigration warnings before he knows he is deportable.<sup>60</sup> Procedurally, the court "decline[d] to burden trial courts with a requirement that they conduct live evidentiary hearings on all section 1016.5 motions"—a holding that has had profound effects for defendants whose plea hearing transcripts no longer exist.<sup>61</sup>

Thus, after *Zamudio*, the California Supreme Court has articulated three elements of a valid section 1016.5 claim:

To prevail on a motion to vacate under section 1016.5, a defendant must establish that (1) he or she was not properly advised of the immigration consequences as provided by the statute; (2) there exists, at the time of the motion, more than a remote possibility that the conviction will have one or more of the specified adverse immigration consequences; and (3) he or she was prejudiced by the nonadvisement.<sup>62</sup>

After *Zamudio*, another question surfaced about the appealability of a section 1016.5 motion. In *People v. Superior Court (Totari)*, the state argued that a defendant must make his claim on direct appeal or else lose his chance to appeal on collateral attack.<sup>63</sup> The court rejected this reasoning and allowed the defendant at issue, an Israeli national challenging a thirteen-year-old conviction, to appeal the order denying his motion.<sup>64</sup>

A final issue concerned the interaction between section 1016.5 and claims of ineffective assistance of counsel. *In re Resendiz* involved a defendant charged with possession for sale of marijuana and cocaine.<sup>65</sup> The defendant, Hugo Resendiz, was a Legal Permanent Resident who had "lived and worked in [the United States] for almost 25 years" and had "two children who are United States citizens."<sup>66</sup> Although Mr. Resendiz signed a plea form and received the proper immigration warnings required under the statute, he claimed that his defense lawyer told him "he would have 'no problems with immigration'" if he pled guilty.<sup>67</sup> This, of course, was a mistake—Mr. Resendiz's conviction violated the controlled substances provision of the INA and counted as an "aggravated felony."<sup>68</sup> After serving a 180-day jail sentence, the INS took Mr. Resendiz into custody and initiated deportation proceedings.<sup>69</sup> Mr. Resendiz brought an ineffective assistance of counsel claim

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60. *Id.* at 699.

61. *Id.* at 698.

62. *People v. Totari*, 50 P.3d 781, 785-86 (Cal. 2002).

63. *See id.* at 785.

64. *Id.* at 787-88.

65. *In re Resendiz*, 19 P.3d 1171 (Cal. 2001).

66. *Id.* at 1174.

67. *Id.* at 1175.

68. *See* 8 U.S.C. § 1227(a)(2)(A)(iii), (B)(i) (2007).

69. *Resendiz*, 19 P.3d at 1174.

on a habeas appeal. The state argued for a categorical bar against such claims, reasoning that as long as a court abides by the requirements of section 1016.5, a defendant has received all the warnings he is due.<sup>70</sup> The California Supreme Court disagreed, and over a strong dissent by Justice Janice Rogers Brown, held that “affirmative misadvice regarding immigration consequences can in certain circumstances constitute ineffective assistance of counsel.”<sup>71</sup> The court stressed, however, that it still considered deportation to be a “collateral consequence” of a conviction and based its holding on the Sixth Amendment’s right to counsel rather than on due process concerns.<sup>72</sup> The court reasoned that section 1016.5 was designed to enhance defendants’ interaction with their lawyers, not to cut back on their constitutional right to effective assistance of counsel.<sup>73</sup>

Although *Resendiz* opened an avenue for relief in cases of misinformation from defense lawyers, it simultaneously tightened the prejudice requirement for a successful section 1016.5 claim. The court held that a defendant’s assertion that he would not have pled guilty had he received the proper warnings “must be corroborated independently by objective evidence.”<sup>74</sup> The court found against Mr. Resendiz on this score, noting that he had failed to show that the prosecution might have offered a different plea that would have allowed him to avoid deportation.<sup>75</sup> The court also made clear that in reviewing a section 1016.5 motion, a judge could “consider the probable outcome of any trial, to the extent that may be discerned.”<sup>76</sup> Mr. Resendiz had not shown how he might have won his case had it gone to trial. Hence, in spite of the favorable ruling allowing his ineffective assistance of counsel claim to go forward, Mr. Resendiz’s attempt to avoid deportation foundered on *Zamudio*’s prejudice requirement.

The net result of this string of cases is that a defendant who faces deportation and seeks to vacate his conviction under section 1016.5 must navigate a variety of procedural and substantive barriers to secure relief. It is

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70. *Id.* at 1177.

71. *Id.*

72. *Id.* at 1179-80 (arguing that “the collateral consequence doctrine and ineffective assistance claims have separate origins”). This result—that a collateral consequence could still support a collateral attack on a guilty plea—has led one author to argue that *Resendiz* “left the collateral consequences doctrine, as it applies to the immigration consequences of a guilty plea, in a gray area, somewhere between the extremes of a direct consequence and an exception to the collateral consequences doctrine.” Ostroff, *supra* note 54, at 381. For a more general discussion of ineffective assistance claims arising out of failures to advise, see Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697 (2002), and Lea McDermid, *Deportation Is Different: Noncitizens and Ineffective Assistance of Counsel*, 89 CAL. L. REV. 741 (2001).

73. *Resendiz*, 19 P.3d at 1178-79.

74. *Id.* at 1187 (internal citations and quotations omitted).

75. *Id.* at 1187-88.

76. *Id.* at 1187.

important to recall that this is one of the last remaining forms of relief possible for “aggravated felons” under today’s immigration and deportation law. In practice, section 1016.5 and similar laws in other jurisdictions have indeed functioned as rare avenues of relief from deportation. The Board of Immigration Appeals (BIA) has ruled that “a conviction that is vacated on account of a procedural or substantive defect in the underlying criminal proceedings is no longer considered a conviction” under the INA.<sup>77</sup> Most federal courts have accepted this distinction, although the Fifth Circuit has seemingly taken a more aggressive approach.<sup>78</sup> In any event, the Board of Immigration Appeals has frequently terminated deportation proceedings as a result of successful section 1016.5 motions.<sup>79</sup> As a result, criminal aliens will undoubtedly continue to pursue such motions, even after extremely long delays between their guilty pleas and the initiation of deportation proceedings. As explained below, this lag, which can exceed a decade, causes a significant evidentiary problem.

#### B. Missing Plea Hearing Transcripts: A Problem of Proof

While *Zamudio*, *Totari*, and *Resendiz* did much to clarify the state of the law surrounding section 1016.5, they also set up a significant problem that has yet to be resolved. The cases stand for several propositions: (1) that a court must provide a noncitizen defendant with the immigration warnings pertinent to his individual situation; (2) that a defendant can bring a motion to vacate under section 1016.5 years after an original conviction—more than a decade may pass without the motion being ruled untimely; and (3) a court need not hold evidentiary hearings to rule on a section 1016.5 motion.

Taken together, these holdings place a great deal of pressure on the plea hearing transcripts from the underlying criminal conviction. A quick glance at these records will plainly answer some basic questions at the heart of section 1016.5. Was the defendant warned? Were the warnings accurate and

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77. *In re Rangel-Corona*, 2006 WL 1558730, File A91 972 604 (B.I.A. Apr. 19, 2006); see also *In re Pickering*, 23 I. & N. Dec. 621, 624 (B.I.A. 2003).

78. *Compare* *Pinho v. Gonzales*, 432 F.3d 193, 193 (3d Cir. 2005) (adopting a distinction between convictions “vacated for rehabilitative purposes” from those vacated because of “underlying defects in the criminal proceedings”), *with* *Renteria-Gonzalez v. INS*, 322 F.3d 804, 814 (5th Cir. 2002) (holding that “a vacated or otherwise expunged state conviction remains valid under” the INA). *But see* *Discipio v. Ashcroft*, 369 F.3d 472, 474-75 (5th Cir. 2004) (noting that the Fifth Circuit was “out of step with the rest of the nation” but “reluctantly” following *Renteria-Gonzalez*). After the Justice Department petitioned the court to vacate *Discipio*, the case was remanded to the BIA for dismissal, leaving “the precise holding of *Renteria-Gonzalez* up in the air.” *Pinho*, 432 F.3d at 210 n.22.

79. See, e.g., *In re Rangel-Corona*, 2006 WL 1558730, File A91 972 604 (B.I.A. Apr. 19, 2006); *In re Arteaga-Garcia*, 2004 WL 2374496, File A29 529 957 (B.I.A. Aug. 3, 2004); *In re Lopez-Villa*, 2004 WL 2374504, File A91 689 596 (B.I.A. Aug. 3, 2004); see also *In re Adamiak*, 23 I. & N. Dec. 878 (B.I.A. 2006) (recognizing a conviction vacated under an analogous Ohio state law as not valid for immigration purposes).

sufficient?<sup>80</sup> Did the defendant understand the warnings? Did he have a chance to discuss the possible consequences with his defense counsel? The California Supreme Court has emphasized the importance of transcripts in the context of *Boykin-Tahl* warnings, which require courts to tell defendants pleading guilty that they are waiving certain constitutional rights.<sup>81</sup> In this context, the court has stated that “a quick review of the transcript of the sentencing hearing may be all that is necessary” to rule on a motion to strike under *Boykin-Tahl*, and that “[f]or those cases in which the record fails to show the defendant was told of his rights or that he affirmatively waived them, . . . a concern arises the plea may be constitutionally invalid.”<sup>82</sup> Yet in the section 1016.5 context it is not at all uncommon for courts to decide section 1016.5 motions without the benefit of any court record. The result is that defendants’ deportations hang in the balance while courts decide their cases without the only piece of evidence that matters.

At the heart of this evidentiary problem is an obscure provision of the California Government Code, which provides for the routine destruction of court reporter notes in criminal cases after ten years.<sup>83</sup> The problem arises because it often takes more than a decade for the INS (now ICE) to initiate deportation proceedings. For example, *Totari* involved an Israeli citizen whose methamphetamines charge dated back to 1985. By the time he moved to vacate his conviction, thirteen years had passed and “the reporter’s transcript and court reporter’s notes of the guilty plea hearing had been destroyed, as authorized under Government Code section 68152.”<sup>84</sup> As discussed below, this is hardly an uncommon occurrence.

The California Supreme Court has yet to address this problem directly, but lower courts have created a framework for dealing with missing transcripts. The Second Appellate District performed the most in-depth treatment of this issue in *People v. Dubon*.<sup>85</sup> There, the defendant, a citizen of Honduras, pled nolo contendere in 1987 to a charge of transporting marijuana. Twelve years later, the INS arrested the defendant and ordered him deported. The following

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80. Although the warnings appear straightforward and automatic, judges can and have made mistakes. In *People v. Mendoza*, No. H026309, 2004 WL 1284016 (Cal. App. Ct. June 10, 2004), the trial judge mistakenly told a defendant that he could avoid deportation by applying to the INS for a legal status that would enable him to remain in the United States. *Id.* at \*5. On collateral attack, the judge admitted his error but balked at reading the pertinent part of the transcript into the record, telling the defense lawyer, “I’ve read it. Don’t have to embarrass me any more than you already have. . . . As I keep telling these addicts, nobody’s perfect.” *Id.* Mistakes and omissions are not limited to California courts. *See, e.g.*, *State v. Sorino*, 118 P.3d 645 (Haw. 2005); *State v. Yanez*, 782 N.E.2d 146 (Ohio Ct. App. 2002); *Commonwealth v. Hilaire*, 777 N.E.2d 804 (Mass. 2002).

81. *See Boykin v. Alabama*, 395 U.S. 238 (1969); *In re Tahl*, 460 P.2d 449 (Cal. 1969).

82. *People v. Allen*, 981 P.2d 525, 537 (Cal. 1999).

83. CAL. GOV’T CODE § 68152(j)(7) (2007).

84. *People v. Totari*, 50 P.3d 781, 783 (Cal. 2002).

85. *People v. Dubon*, 108 Cal. Rptr. 2d 914 (Cal. Ct. App. 2001).



year, in 2000, Dubon sought the vacation of his plea, claiming a violation of section 1016.5.<sup>86</sup> As was the case in *Totari*, the court noted that “Dubon’s case file contained no reporter’s transcript for the hearing at which Dubon pled *nolo contendere*. Because the court reporter’s notes were destroyed as a matter of course after 10 years, the transcript was no longer available.”<sup>87</sup> At the trial court, the defendant testified that he was not advised of the immigration consequences of his conviction and that had he known them he never would have pled as he did.<sup>88</sup> In support of the conviction, the state offered a minute order from the defendant’s file showing that a box entitled “Defendant advised of possible effects of plea on any alien/citizenship/probation parole status” had been checked. Further, the trial judge who took Dubon’s plea testified that although he “had no independent recollection of Dubon and had no specific recollection of advising Dubon as required by section 1016.5,” it was his “practice and habit” to provide the required warnings and that he was “pretty careful about it.”<sup>89</sup> The trial court denied the defendant’s petition, finding that the question about the advisement boiled down to a credibility contest between the defendant and the original trial judge. The court found this to be an easy call, commenting, “[I]t’s common sense. It’s [Dubon’s] third time through the system. He gets the advice, and 12 years later he realizes he’s about to be deported and he doesn’t have any memory of having got[ten] the advice. That makes sense to me.”<sup>90</sup> Accordingly, the court held that the trial judge’s “testimony over balances the defendant’s credibility” and denied the petition.<sup>91</sup>

On appeal, Dubon argued that the prosecution had failed to rebut section 1016.5’s built-in presumption that, “absent a record advisements regarding immigration consequences of a plea were given, a defendant is presumed not to have received them.”<sup>92</sup> The Second Appellate District held that section 1016.5’s statutory presumption is a rebuttable presumption affecting the burden of proof and must be established by a preponderance of the evidence.<sup>93</sup> Thus, the court concluded that “the presumption places upon the People the burden of proving by a preponderance of the evidence the nonexistence of the presumed fact, i.e., that the required advisements were given.”<sup>94</sup> In the case itself, the court held that the People had surmounted this burden. The minute order alone

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86. *Id.* at 916. Although Dubon technically brought his claim as a writ of *coram nobis* rather than as a section 1016.5 motion, courts treat the two claims identically. *See* *People v. Castaneda*, 44 Cal. Rptr. 2d 666, 670 (Cal. Ct. App. 1995) (“[A] motion to vacate the judgment is recognized as equivalent to a petition for the common law remedy of a writ of error *coram nobis*.”) (citations omitted).

87. *Dubon*, 108 Cal. Rptr. 2d at 917 .

88. *Id.*

89. *Id.* at 918.

90. *Id.*

91. *Id.*

92. *See id.*; CAL. PENAL CODE § 1016.5(b) (2007).

93. *Dubon*, 108 Cal. Rptr. 2d at 921.

94. *Id.*

was not enough since it did not show with sufficient specificity exactly what kind of immigration warning the defendant received.<sup>95</sup> However, based on the minute order coupled with the trial judge's in-court testimony, the *Dubon* court held that the lower court did not err in crediting the People's case over the defendant's assertions.<sup>96</sup>

Other defendants have faced a similar evidentiary dilemma as they seek to withdraw guilty pleas long past. In a series of unreported cases, California appellate courts have affirmed denials of section 1016.5 motions while voicing outright contempt for the declarations defendants must submit as substitutes for plea hearing transcripts. For example, in *People v. Foroutan*, the First Appellate District upheld a trial court's denial of relief under section 1016.5 in the absence of a hearing transcript, which had been destroyed pursuant to California Government Code section 68152(j)(7).<sup>97</sup> Like the defendant in *Dubon*, the defendant in *Foutoran* submitted a declaration stating that he "would never have pleaded guilty to these felonies if I had known of these immigration consequences."<sup>98</sup> Dismissing this assertion, the trial court explained, "I don't think his declaration adds anything . . . because frankly I don't find his declaration to be anything other than a summary of helpful, self-serving statements which are probably incompetent and might be false. I suspect he doesn't have any recollection of what went on in the circumstances that long ago."<sup>99</sup>

In *People v. Mendoza*, the Sixth Appellate District reached a similar conclusion.<sup>100</sup> The defendant first pled guilty to drug charges in 1992, but the INS did not begin deportation proceedings until 2003. With the plea hearing transcript destroyed pursuant to Government Code section 68152(j)(7), the court turned to a minute order similar to the one used in *Dubon*.<sup>101</sup> Citing *Dubon*, the court assumed arguendo that the minute order was insufficient to rebut the statutory presumption of Penal Code section 1016.5. Nevertheless, the court ruled against the defendant on the issue of prejudice, finding that "[a]lthough [the] defendant's declaration [that he would not have pled guilty had he known the consequences] was uncontradicted, it was also self-serving"

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95. *Id.* at 922 (noting that the minute order "does not state that Dubon was given the required advisement in full, or accurately" and that "a defendant must at least be told of the immigration consequences pertinent to his or her situation").

96. *Id.* at 923. This conclusion was bolstered by the fact that the trial judge had retained his written notes from the plea colloquy, which indicated that he knew Dubon was Honduran. This, the court reasoned, increased the chances that the judge had delivered the immigration warnings.

97. *People v. Foroutan*, No. A100436, 2005 WL 240421, at \*2 (Cal. Ct. App. Jan. 26, 2005).

98. *Id.* at \*4.

99. *Id.*

100. *People v. Mendoza*, No. H026309, 2004 WL 1284016 (Cal. Ct. App. June 10, 2004).

101. *Id.* at \*6.

and that “[a]s a general rule, self-serving declarations lack trustworthiness.”<sup>102</sup> The court found that the defendant probably could not have secured a better plea, and, moreover, had he gone to trial he probably would have been convicted and subject to the same immigration consequences.<sup>103</sup>

*People v. Marquez* provides another example.<sup>104</sup> There, the defendant, a Mexican citizen, pled guilty to possession of cocaine for sale in 1990.<sup>105</sup> At the time of the offense, Marquez was twenty-four years old. He received three years probation and seven months in jail. After serving his sentence, he married and had three children, all U.S. citizens. Marquez applied for U.S. citizenship in 1997, and when he went to the INS to check on the status of his application in 2001, he was arrested.<sup>106</sup> The INS began deportation proceedings on the basis of the 1990 conviction. Marquez moved to vacate his plea, arguing that the court had failed to provide the immigration warnings required by section 1016.5, but because eleven years had passed since his plea, the hearing transcripts had been destroyed under Government Code section 68152(j)(7).<sup>107</sup> Again, the trial court turned to a minute order for a clue as to what transpired at the plea hearing, but this time the checked box yielded even less information than the orders used in *Dubon* and *Mendoza*. The boxes checked in *Marquez* indicated only that the defendant was “[v]oir dired in open court” and that he “waives rights”—there was no mention of immigration warnings at all.<sup>108</sup> The People responded by offering a clerk’s docketing statement, which included a checked box indicating “advised of P.C. 1016.5” and an affidavit from the sentencing judge, in which he stated that

although he could not specifically recall defendant’s case, it was “his habit and custom prior to acceptance of a plea of guilty or no contest to advise each defendant that if he was not a citizen . . . the offense for which he was charged may have the consequences of deportation, exclusion from the United States, or denial of naturalization . . . .”<sup>109</sup>

The defendant requested an opportunity to cross examine the People’s witnesses, but the court denied his request, and held that “the docket sheet combined with [the trial judge’s] declaration was a sufficient record that the immigration advisements required by section 1016.5 had been given.”<sup>110</sup> The Sixth Appellate District affirmed on appeal, holding that under *Zamudio* an

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102. *Id.* at \*8 (citing *People v. Duarte*, 12 P.3d 1110 (Cal. 2000)).

103. *Id.*

104. *People v. Marquez*, No. H024074, 2003 WL 1901219 (Cal. Ct. App. Apr. 17, 2003).

105. *Id.* at \*1.

106. *Id.* at \*1-2.

107. *Id.* at \*2.

108. *Id.*

109. *Id.*

110. *Id.* at \*3.

evidentiary hearing was not required to resolve “conflicts between the declarations of defendant and [trial judge].”<sup>111</sup>

The problems with the kind of approach exemplified by *Dubon*, *Foutoran*, *Mendoza*, and *Marquez* are self-evident. Without plea hearing transcripts, the section 1016.5 hearings can become something of a farce. The defendant, facing imminent deportation for a crime committed long ago and with no other prospect of discretionary relief, has every incentive to lie in his declaration. But even if his memory is crystal clear, a reviewing court is not likely to give much weight to his “self-serving” statements. In response, the state combs through what is left of the record searching for checked boxes that indicate the judge said *something* at the plea hearing. The original trial judge, his clerk, or both submit a declaration stating that although they have no actual memory of the case at hand, the judge *probably* administered the required immigration warnings. Of course, after more than a decade, memories have faded and any notes left over are likely to be cryptic at best. And on this flimsy basis, the conviction stands and a deportation inevitably follows.<sup>112</sup>

Given the harsh penalties and lack of discretionary relief under current immigration law, it is critical that this rare safety valve in the system operates as fairly and as transparently as possible. To this end, the next Part of this Comment proposes a series of suggestions for improvement.

#### IV. IMPROVING THE SECTION 1016.5 REGIME

Before cataloguing possible remedies for the evidentiary problem inherent in section 1016.5 motions, it makes sense first to ask whether the system should be improved at all. There are several colorable arguments to leave well enough

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111. *Id.* at \*5-6.

112. California courts are not alone in dealing with a collision between statutes requiring immigration warnings and rules governing the routine destruction of court records. A similar problem has cropped up in the District of Columbia. *See Valdez v. United States*, 906 A.2d 284 (D.C. 2006). The Supreme Judicial Court of Massachusetts confronted the problem as well. It responded by limiting the application of the statutory presumption that a defendant had not received the warnings in the absence of a hearing record. *See Commonwealth v. Rzepphiewski*, 725 N.E.2d 210, 215-16 (Mass. 2000) (holding that a “reconstructed record” based on a judge’s assertion that he typically delivered the required immigration warnings was sufficient to deny alien defendant the statutory presumption that he had not been warned); *Commonwealth v. Pryce*, 709 N.E.2d 433, 434 (Mass. 1999) (same). *But see Commonwealth v. Jones*, 632 N.E.2d 408 (Mass. 1994) (vacating an eleven-year-old conviction when absolutely no record of the plea hearing existed); *Commonwealth v. Ciampa*, 747 N.E.2d 185 (Mass. App. Ct. 2001) (placing more stringent requirements on judges’ affidavits in order to show defendant had been warned). Eventually, the Massachusetts legislature amended the law to ensure that alien defendants would be presumed not to have been warned in the absence of an “official record” or contemporaneous report of the plea hearing. *See MASS. GEN. LAWS ch. 278, § 29D* (2004) (amended by 2004 Mass. Acts ch. 225). The Massachusetts experience is illuminating for California because it demonstrates that state legislators can summon the political will to enhance statutory protections for criminal aliens.

alone. First, the problem affects a relatively small number of people—only criminal aliens who, for whatever reason, have waited more than ten years to challenge their convictions. Second, any fix should be balanced against the benefits in judicial economy associated with the routine destruction of court records. Third, one could argue that the current system probably produces just and equitable results as it stands. This Part will analyze and critique these arguments and conclude by offering a menu of options to improve the section 1016.5 regime.

#### A. *The Case for Reform*

While the arguments for preserving the status quo have some force, they should not lead us to abandon the search for a more effective regime. Regarding the number of criminal aliens affected, there is some evidence that convicted aliens facing deportation are increasingly relying on section 1016.5 motions. In one northern California county, the Supervising Deputy District Attorney (SuDDA) in charge of the motions team assigned about five section 1016.5 motions in 2005 and twenty such motions in 2006—a 400% increase in only a year's time.<sup>113</sup> “Many” of these motions involved cases in which the plea hearing transcript no longer existed. The SuDDA attributed the surge to increased resources to process deportations at ICE on the one hand and better trained defense lawyers on the other.<sup>114</sup> And regardless of the exact number of individuals affected, it is enough to refer to the pages of the U.S. reports, which are replete with language underscoring the seriousness of deportation. In 1922, the Supreme Court noted that deportation “may result . . . in loss of both property and life, or of all that makes life worth living.”<sup>115</sup> Later, Justice Black observed that a deported alien who cannot return to the United States “loses his job, his friends, his home, and maybe even his children, who must choose between their [parent] and their native country.”<sup>116</sup> In 1957, Justice Black commented, “To banish [noncitizens] from home, family, and adopted country is punishment of the most drastic kind whether done at the time when they were convicted or later.”<sup>117</sup> But most fittingly for the purposes of analyzing the operation of California Penal Code section 1016.5 in the absence of plea transcripts, the Court has stated, “In this area of the law, involving as it may the equivalent of banishment or exile, we do well to eschew technicalities and fictions and to deal instead with realities.”<sup>118</sup> Even if the evidentiary problem

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113. E-mail from Cal. Supervising Deputy Dist. Attorney to author (Jan. 9, 2006) (on file with author) (requesting anonymity and expressing his personal views).

114. *Id.*

115. *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

116. *Galvan v. Press*, 347 U.S. 522, 533 (1954) (Black, J., dissenting).

117. *Lehmann v. Carson*, 353 U.S. 685, 691 (1957) (Black, J., concurring).

118. *Costello v. INS*, 376 U.S. 120, 131 (1964). The California Supreme Court quoted this statement with approval in *In re Resendiz*, 19 P.3d 1171, 1181 (Cal. 2001).

outlined above only affected a handful of individuals per year, it would be worth it to deal, as much as possible, in reality rather than fiction.

Regarding the issue of judicial economy, it is true that section 1016.5 hearings are hardly the only cases where missing transcripts may become a problem. California courts have held that

[w]hen transcript notes are no longer in existence, the proper procedure is to attempt to reconstruct the trial testimony in a settled statement. A satisfactory record may at times be prepared through the use of notes taken during the trial by the attorneys and the trial judge; by the memories of attorneys, witnesses, and jurors; by agreement of the parties; and possibly from other sources.<sup>119</sup>

Moreover, any change in record retention procedures could upset legislative intent; in enacting statutes governing the destruction of transcripts, the legislature desired “to eliminate the requirement of trial court involvement in the decision to destroy notes in individual cases and permit routine destruction unless a specific order is made to preserve them.”<sup>120</sup> However, while in most cases ten years will be ample time for a defendant to challenge his plea on direct appeal, a noncitizen may not realize that his statutory rights under section 1016.5 have been violated until he is threatened with deportation, making direct appeal impossible.<sup>121</sup> As one California court noted in the course of denying a defendant’s request to preserve his trial exhibits for a hypothetical collateral attack, “[a]ny claim that a defendant has to the retention of his trial exhibits beyond the statutory period could only be justified by a specific, detailed showing concerning the potential merit of a collateral attack and the significance of particular exhibits to the defense.”<sup>122</sup> A noncitizen who does not know that he faces immigration consequences cannot make such a showing until it is too late.

The most compelling argument against meddling with the section 1016.5 regime is that the system works well enough as it is and probably yields correct and just results. After all, trial judges are likely to give the immigration warnings automatically as part of routine plea colloquies. On the other hand, a defendant, years after the fact, is unlikely to remember the absence of an occurrence, i.e. that he did not receive certain immigration warnings. And of course, with the stakes as high as they are, a defendant has every incentive to lie, especially with no record to contradict him. The problem with this view is that it assumes too much. First, as discussed above, a defendant’s declaration will nearly always be considered “self-serving” and thus untrustworthy.<sup>123</sup> It is

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119. *People v. Everett*, 274 Cal. Rptr. 429, 431 (Cal. Ct. App. 1990) (internal citations and quotations omitted).

120. *Id.* at 431 (discussing California Government Code section 69944, which, like section 68152, provides for the destruction of reporting notes after ten years).

121. *See People v. Totari*, 50 P.3d 781, 785 (Cal. 2002); *People v. Superior Court (Zamudio)*, 999 P.2d 686, 699-700 (Cal. 2000).

122. *Augustine v. Superior Court*, 84 Cal. Rptr. 2d 487, 491 (Cal. Ct. App. 1999).

123. *See supra* note 102 and accompanying text.

therefore unlikely that a defendant will ever prevail in a credibility contest that pits his word against that of a trial judge, who may even sit in the same jurisdiction as the reviewing judge. Second, a trial judge's recollection should also be viewed with some skepticism; the judge has a strong reputational and professional incentive to testify that he delivered the proper warnings as required by law. Third, and most importantly, under *Zamudio* a defendant has no right to cross-examine the People's witnesses or to develop the record in ways that may support his claim. The end result is that it is difficult to imagine a scenario in which a defendant could ever prevail on a section 1016.5 motion without recourse to a plea hearing transcript, rendering the remedy provided under the statute illusory for a significant number of defendants.

Adopting some or all of the suggestions offered below will not create a loophole in federal immigration law, opening the floodgates for vacating prior convictions and the termination of deportation proceedings. Reviewing courts will still have ample discretion to deny section 1016.5 motions. Even under an improved system, a defendant will still have to prove due diligence and prejudice to prevail—often no easy task. It is therefore worthwhile to follow the U.S. Supreme Court's advice and, when dealing with an issue of such importance, "eschew technicalities and fictions and to deal instead with realities."<sup>124</sup> That means abandoning to whatever extent possible the reliance on the fictions of decades-old declarations and enigmatic minute orders in favor of more reliable evidence whenever possible.

## B. *Suggested Improvements*

### 1. *Record retention*

One straightforward solution is to require courts to retain plea hearing transcripts for a longer period of time given the often lengthy delay between a conviction and deportation. Such a step would not be unprecedented; court records pertaining to adoptions,<sup>125</sup> name changes,<sup>126</sup> eminent domain,<sup>127</sup> paternity,<sup>128</sup> and naturalization<sup>129</sup> are all retained permanently by statute. Records relating to family law are retained for thirty years.<sup>130</sup> Increasing the cushion for plea hearing transcripts from ten to twenty or thirty years could address most, if not all, of the cases in which this problem arises at a relatively small cost. Indeed, longer retention could actually *increase* judicial economy by reducing the number of frivolous section 1016.5 hearings. Defendants who

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124. *Costello v. INS*, 376 U.S. 120, 131 (1964).

125. CAL. GOV'T CODE § 68152(a) (2007).

126. *Id.* § 68152(b).

127. *Id.* § 68152(c)(4).

128. *Id.* § 68152(c)(8).

129. *Id.* § 68152(j)(15).

130. *Id.* § 68152(5).

were adequately warned will no longer be able to bring section 1016.5 motions relying on the statutory presumption in their favor. According to a twenty-seven-year veteran of a California District Attorney's Office, defendants will sometimes wait until the very last possible minute to file their motions in the hopes that the records have been destroyed.<sup>131</sup> Retaining the relevant court records for longer than ten years will eliminate this kind of sandbagging and will save the court—not to mention the District Attorney's Office—a great deal of time and trouble.

Along the same lines, third parties could retain the records in order to avoid completely any additional cost to the state. Defense lawyers could be encouraged to request and store plea transcripts and to retain their notes more systematically. Alternatively, a non-governmental organization could undertake to maintain a database of these public records. Given the obscurity of this problem, however, this seems unlikely, at least in the near term. Another alternative may be to encourage commercial criminal record databases to add plea transcripts to their archives and charge defendants a fee to access them.<sup>132</sup>

## 2. Prosecutorial discretion

Another approach would be for prosecutors to exercise their discretion and decline to oppose section 1016.5 motions when the record no longer exists. There is evidence that prosecutors do take collateral consequences like deportation into account throughout the plea process, and some “have acknowledged manipulating state charges to circumvent federal deportation.”<sup>133</sup> According to one author, such “stories of plea deals to avoid hardship abound.”<sup>134</sup> In fact, in 2001, the president of the National District Attorneys Association commented, “Our job, our duty, [as prosecutors] is to seek justice . . . . How can we ignore a consequence of our prosecution that we know will surely be imposed by the operation of law?”<sup>135</sup>

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131. E-mail from Cal. Supervising Deputy Dist. Attorney, *supra* note 113 (“Sometimes I think that there is intentional delay, knowing that sooner or later the court will purge its files.”).

132. Such commercial services are common but generally only provide basic information on criminal convictions. *See, e.g.,* Criminal Watchdog, <http://www.criminalwatchdog.com>; National Public Record Criminal Registry, <https://www.ncrpr.org>.

133. *See* Mikos, *supra* note 1, at 1454.

134. *See id.* at 1455 & n.143.

135. Robert M. A. Johnson, President, Nat'l Dist. Attorneys Ass'n, Message from the President: Collateral Consequences (May-June 2001), *available at* [http://www.ndaa.org/ndaa/about/president\\_message\\_may\\_june\\_2001.html](http://www.ndaa.org/ndaa/about/president_message_may_june_2001.html). Johnson singled out deportation as a particularly harsh consequence of a conviction, recalling a case in which a father “would be deported upon conviction, destroying a family that the district attorney and the victim’s family thought could be saved.” *Id.* He concluded with a stark warning to district attorneys if they failed to consider collateral consequences, stating, “[W]e will suffer the disrespect and lose the confidence of the very society we seek to protect.” *Id.*; *see also* Catherine A.



However, not all prosecutors share this approach. Taking Santa Clara County as an example, the District Attorney in *Mendoza*,<sup>136</sup> a section 1016.5 case, told the trial court that “it ‘has been and continues to be’ the policy of the District Attorney’s Office in Santa Clara County ‘that immigration consequences are not to affect our plea bargain method of disposing of cases.’”<sup>137</sup> Responding to a survey for this Comment, a California prosecutor echoed this sentiment:

A good policy followed by many, if not most, prosecutors is to charge what they can prove, and then prove what they have charged, letting the chips fall where they may. Making accommodations to particular defendants on account of their special situation is a slippery slope and could easily lead to the unequal enforcement of the law.

He concluded that local prosecutors “should not be [the] party [that] attempts to evade federal immigration laws. Changes in federal immigration laws should come from Congress.”<sup>138</sup>

It follows from this view that every section 1016.5 motion that can be opposed in good faith ought to be so opposed. As the California Supervising Deputy District Attorney put it, prosecutors

are not in the immigration business . . . . These collateral consequences arise due to the public policies enacted by state and federal legislators. The prosecutor’s job is to enforce the law, as enacted, equally and fairly, and not to subvert the public policy expressed in state and federal statutes.<sup>139</sup>

Consequently, “[t]he lack of a transcript is of no consequence and should not determine the outcome of litigation.”<sup>140</sup>

While this bright-line approach is laudable for its even-handedness and respect for the law, it overlooks the vast and crucial role that prosecutorial discretion plays in our criminal justice system.<sup>141</sup> In deciding what to charge—or whether to defend a decade-old conviction that will lead to a deportation—a prosecutor is free to weigh the equities of an individual case and settle on the best outcome for the defendant, the community, and the legitimacy of the law enforcement system as a whole. After all, “[t]he responsibility of a public

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Christian, *Awareness of Collateral Consequences: The Role of the Prosecutor*, 30 N.Y.U. REV. L. & SOC. CHANGE 621, 622 (2006) (arguing that “prosecutors must consider the collateral consequences of the convictions they obtain if they are to ensure that justice is achieved”).

136. See *supra* note 100 and accompanying text.

137. *People v. Mendoza*, No. H026309, 2004 WL 1284016, at \*8 (Cal. App. Ct. June 10, 2004) (internal quotations omitted).

138. E-mail from Cal. Supervising Deputy Dist. Attorney, *supra* note 113.

139. *Id.*

140. *Id.*

141. See *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (“[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.”).

prosecutor differs from that of the usual advocate; it is to seek justice, not merely to convict.”<sup>142</sup> It is no violation of federal immigration law to allow section 1016.5 motions to go unopposed in cases where the transcript is missing, especially if the crime at issue was a minor one, the defendant has led a law-abiding life since the earlier conviction, and deportation will work a significant hardship on the defendant’s family.<sup>143</sup>

On the other hand, according to the California prosecutor, a “sad story” should not motivate prosecutorial decisions: “A prosecutor has to insulate himself from these extraneous considerations, including sympathy for the defendant, if he is to equally enforce the law and, in the immigration situation, to avoid active subversion of federal immigration policy.”<sup>144</sup> Yet it is not mere sympathy that calls for a different approach to section 1016.5 motions brought in the absence of a record—it is the procedural infirmity inherent in deciding such weighty cases on the basis of such flimsy evidence. Such a system can only erode the legitimacy of both the criminal justice system and the immigration system over the long run. Given the utter lack of discretionary relief left under the INA and the evidentiary problems discussed above, local prosecutors may be the only failsafe left in the system. Local district attorneys offices are certainly free to take a hard-line approach to section 1016.5 motions, and they have compelling justifications for doing so. However, they are not *required* to do so and should consider exercising their discretion to promote justice in the face of procedural weaknesses.

### 3. Procedural improvements

Two final options for improvement involve altering the procedures attending section 1016.5 motion hearings to compensate for the evidentiary problem. The first, increasing the state’s burden of proof under section 1016.5’s rebuttable presumption, would likely—but not necessarily—require a legislative amendment. The second, entitling a defendant to an evidentiary hearing with live testimony, could be judicially mandated.

#### a. Increasing the burden of proof

When it enacted section 1016.5, the California legislature wisely foresaw the importance of the plea hearing transcript in motions to vacate under the statute and included a presumption in favor of the defendant in cases where the

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142. MODEL CODE OF PROF’L RESPONSIBILITY EC 7-13 (1983).

143. See Christian, *supra* note 135, at 622 (arguing that “[f]irst time offenders who commit truly minor, nonviolent offenses who will face . . . deportation should, upon conviction and depending on the facts of the case, be afforded an opportunity of a more favorable disposition”).

144. E-mail from Cal. Supervising Deputy Dist. Attorney, *supra* note 113.

record is silent.<sup>145</sup> In *Dubon*, an intermediate appellate court held that the statute set up a rebuttable presumption requiring the state to overcome it by a preponderance of the evidence.<sup>146</sup> This low evidentiary standard has allowed the state to prevail on the basis of rather weak evidence.<sup>147</sup> As the *Dubon* court reasoned, the preponderance standard is essentially mandated by California Evidence Code section 115, which states that “[e]xcept as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence.”<sup>148</sup> Therefore, it would seem, the state legislature would have to amend California Penal Code section 1016.5 to provide explicitly for a higher standard.

Raising the burden of proof to “clear and convincing” evidence, which is still well short of the standard required for a criminal conviction, would require the state to prove its case in terms “so clear as to leave no substantial doubt,” and “sufficiently strong to command the unhesitating assent of every

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145. CAL. PENAL CODE § 1016.5(b) (2007) (“Absent a record that the court provided the advisement required by this section, the defendant shall be presumed not to have received the required advisement.”).

146. *People v. Dubon*, 108 Cal. Rptr. 2d 914, 920-21 (Cal. Ct. App. 2001); *see also* text accompanying notes 92-96.

147. *See, e.g.*, *People v. Foroutan*, No. A100436, 2005 WL 240421 (Cal. Ct. App. Jan. 26, 2005); *People v. Mendoza*, No. H026309, 2004 WL 1284016 (Cal. Ct. App. June 10, 2004). Only one very recent case provides a rare counter-example. In *People v. Castro-Vasquez*, No. B192721, 2007 WL 882132 (Cal. Ct. App. Mar. 26, 2007), a California appellate court granted a 1016.5 motion to vacate a fourteen-year-old drug conviction in the absence of a plea hearing transcript. Oddly, the state did not offer the usual affidavit from the original trial judge recounting a habit and custom of providing immigration warnings. Instead, the state’s only evidence was a minute order with a checked box indicating the defendant had received some advisement about immigration status. *Id.* at \*1. The prosecutor did not file a written opposition to the defendant’s motion, did not object to the hearing, and did not cross-examine the defendant. *Id.* at \*1 n.4. Most surprisingly, the trial court simply accepted as true the defendant’s assertion that he would not have accepted the plea had he been advised, and the judge declined to hear any testimony on the issue. *Id.* at \*3. Nevertheless, the trial court denied the motion for lack of prejudice, reasoning that the defendant would have lost had he gone to trial. *Id.* On appeal, the court held that the docket sheet, without more, was insufficient under *Dubon* to rebut section 1016.5’s presumption that the defendant had not received the required warnings. *Id.* at \*2. The court further held that the defendant had met *Zamudio*’s prejudice prong. The court explained that under *In re Resendez* a defendant need not show that he would have won had he proceeded to trial—*Resendez* only suggested that a court could consider the probable outcome of a trial as one factor informing its decision of whether a defendant would have pled or not. *Id.* at \*3. That inquiry was unnecessary in *Castro-Vasquez* because the trial court had simply accepted as fact that the defendant would not have pled guilty had he known he could be deported and permanently excluded after doing so. While it is heartening to see a court sustain a 1016.5 motion in the absence of a plea hearing transcript, *Castro-Vasquez* appears to be little more than a very rare anomaly. It is unusual for the state to provide no evidence whatsoever, and for a trial court to credit a defendant’s assertion so completely, even declining testimony. As the appeals court pointed out, “the trial court could have rejected the appellant’s testimony, if given, but it did not do so.” *Id.* at \*3.

148. CAL. EVID. CODE § 115 (2007).

reasonable mind.”<sup>149</sup> In other words, while the preponderance standard requires a mere probability, the clear and convincing test requires a *high* probability.<sup>150</sup> In spite of deportation’s status as one among many “collateral consequences” of conviction, this minor adjustment seems reasonable given the virtual certainty of “banishment or exile” in the event of the motion’s denial.<sup>151</sup> Moreover, an increase in the burden of proof would hardly be unprecedented. “Proof by clear and convincing evidence is required where particularly important individual interests or rights are at stake, such as the termination of parental rights, involuntary commitment, and deportation.”<sup>152</sup> In fact, the United States Supreme Court has recognized the need for a higher standard of proof in deportation proceedings. In *Woodby v. INS*, the Court held that “no deportation order may be entered unless it is found by clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true.”<sup>153</sup> Noting that the Court had “not closed its eyes to the drastic deprivations that may follow when a resident of this country is compelled by our Government to forsake all the bonds formed here and go to a foreign land,” the Court pointedly rejected the government’s assertion that because deportation proceedings are technically administrative and not criminal in nature, the usual preponderance standard should apply, stating, “To be sure, a deportation proceeding is not a criminal prosecution. But it does not syllogistically follow that a person may be banished from this country upon no higher degree of proof than applies in a negligence case.”<sup>154</sup>

The California Supreme Court has not explicitly affirmed *Dubon*’s preponderance standard for section 1016.5 motions. Consequently, although a legislative amendment to Penal Code section 1016.5 would be the surest way of increasing the burden of proof, the California Supreme Court could rely on the United States Supreme Court’s reasoning in *Woodby* to ratchet up the burden of proof, avoiding the need for legislative action.<sup>155</sup>

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149. 1 B.E. WITKIN, CALIFORNIA EVIDENCE ch. 3, § 38 (4th ed. 2000) (citations omitted).

150. ALAN H. KNICKERBOCKER, CALIFORNIA JURISPRUDENCE, EVIDENCE § 96 (3d ed. 2006); see also *In re Angelia P.*, 623 P.2d 198, 204 (Cal. 1981) (explaining that the standard dates back to 1899 and “retains validity today”).

151. *Costello v. INS*, 376 U.S. 120, 131 (1964).

152. KNICKERBOCKER, *supra* note 150 (emphasis added).

153. 385 U.S. 276, 286 (1966).

154. *Id.* at 284-85 (citation omitted).

155. To be sure, a motion to vacate a criminal conviction is not a deportation proceeding, but the same fundamental right is ultimately at stake in both cases. Further, the California Supreme Court has already used reasoning similar to *Woodby*, emphasizing the hardship attending deportation, when interpreting Penal Code section 1016.5. See *In re Resendiz*, 19 P.3d 1171, 1182 (Cal. 2001) (noting that “[p]erhaps nowhere outside of the criminal law are the consequences for the individual so serious” (citation omitted)).

## b. Evidentiary hearings and cross examination

A final suggestion for improvement merits consideration. As noted above, in *Zamudio*, the California Supreme Court “decline[d] to burden trial courts with a requirement that they conduct live evidentiary hearings on all section 1016.5 motions.”<sup>156</sup> By revisiting this holding, the court could increase the accuracy, fairness, and legitimacy of section 1016.5 motions. To be sure, a motion hearing is not a “criminal prosecution” under the Sixth Amendment and the right to confront one’s accuser does not apply.<sup>157</sup> Moreover, as the *Zamudio* court noted, “California law affords numerous examples of a trial court’s authority, in ruling upon motions, to resolve evidentiary disputes without resorting to live testimony.”<sup>158</sup> Nevertheless, since the court’s determination will depend largely on a credibility contest between the defendant and the original trial judge or clerk, it makes sense to allow the defendant to probe that credibility in the usual way—in the crucible of cross examination.<sup>159</sup> At bottom, this solution is predicated on the view that “deportation is different” from other consequences of convictions and therefore merits higher procedural safeguards than apply to other routine motions in criminal law.<sup>160</sup>

## CONCLUSION

Criminal deportation has a long history in the United States and is flowering in our post-9/11 world. As long as the government seeks to deport aliens for crimes committed long ago, many aliens will struggle to avoid that fate by squeezing through any crevice in the seemingly impenetrable fortress of today’s immigration law. California’s section 1016.5 and similar laws in other states provide just such an opportunity. This Comment has shown that section 1016.5, a well-intended and generally well-designed statute, suffers from an unfortunate procedural infirmity that will only become more pronounced as deportation figures continue to rise. And this is not a problem unique to California; other states are facing similar issues as federal authorities move to deport resident aliens whose court records have long since been destroyed.<sup>161</sup>

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156. *People v. Superior Court (Zamudio)*, 999 P.2d 686, 698 (Cal. 2000).

157. U.S. CONST. amend. VI.

158. *Zamudio*, 999 P.2d at 698 (listing examples, including motions for continuances, juror misconduct, and disqualifications of trial judges).

159. An appellate court in Washington State adopted this approach in *State v. Holley*, 876 P.2d 973 (Wash. Ct. App. 1994). There, the Washington statute at issue set forth a presumption against a defendant who signs a plea statement containing the advisement. *Id.* at 978. The defendant in *Holley* had signed such a plea agreement, but the court held that he was entitled to an evidentiary hearing to try to persuade the trial court by a preponderance of the evidence that he had not in fact received the required warnings. *Id.*

160. McDermid, *supra* note 72.

161. *See supra* note 112.

Local prosecutors, state legislators, and state courts all have a role to play in improving a system that affects so many so profoundly.

While some observers have suggested more radical solutions to the problems plaguing the interaction between the criminal justice system and the immigration bureaucracy, such as combining the functions of the sentencing judge and the immigration judge,<sup>162</sup> this Comment suggests more modest changes. The most promising solutions would require legislative or judicial attention. Section 68152 of the California Government Code could be amended to extend the amount of time court reporters retain their notes from ten years to twenty or thirty years. Even without this change, judicial or legislative action could increase the burden of proof in cases where the defendant is presumed not to have received the required warnings from a preponderance to clear and convincing evidence.<sup>163</sup> This minor alteration is more closely aligned with the Supreme Court's deportation jurisprudence and would at least allow the possibility of a defendant's victory on a section 1016.5 motion after the transcript has been destroyed. Finally, the California Supreme Court could revisit its holding in *Zamudio* and require evidentiary hearings to supplement the record when no transcript exists. This change would enhance both the accuracy and legitimacy of section 1016.5 hearings. Relying on local district attorneys seems more problematic. While some district attorneys may "sympathize with the alien defendants because of the extreme hardship attending deportation,"<sup>164</sup> it is clear that some district attorneys will not consider sitting on their hands when a defendant challenges a prior, lawfully obtained conviction. Hence, policies within and across offices are likely to be uneven.

In the end, state laws like California Penal Code section 1016.5 provide a much needed procedural safeguard that allow noncitizens to avoid deportation

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162. See Taylor & Wright, *supra* note 2.

163. Amending California Penal Code section 1016.5 or Government Code section 68152 might be easier said than done given the obscurity of the problem and the current political climate surrounding immigration issues. For example, the outgoing Republican governor of Massachusetts, Mitt Romney, recently unveiled a program allowing state troopers to arrest suspected illegal immigrants and ready them for deportation even for minor traffic infractions. See Michael Levenson & Jonathan Saltzman, *Troopers Can Arrest Illegal Immigrants in Romney Deal: Critics Warn of Profiling, Police Mistrust*, BOSTON GLOBE, Dec. 3, 2006, at 1A. In such a political environment, mobilizing state legislatures to make it more difficult to deport criminal aliens seems unlikely. However, state attitudes may shift with the political winds. Massachusetts' newly elected Democratic governor said he would rescind Governor Romney's plan less than a month after its unveiling. See Andrea Estes, *Patrick Set to Rescind Plan for Troopers: Opposes Use to Arrest Illegal Immigrants*, BOSTON GLOBE, Dec. 22, 2006, at 1A. And the Massachusetts legislature recently amended its section 1016.5 analogue to strengthen protection for alien defendants. See *supra* note 112. The California legislature may be especially receptive to immigrants' rights issues given the state's large immigrant population. Nevertheless, the difficulties inherent in mustering the political support for legislative changes make judicial action to improve the section 1016.5 regime more attractive.

164. Mikos, *supra* note 1, at 1455.

if they were not informed of the immigration consequences of their pleas. Although federal rules lag behind the states in requiring such warnings, the Board of Immigration Appeals has recognized that violations of such statutes represent “a defect in the underlying criminal proceedings” that merits termination of the deportation process.<sup>165</sup> Some noncitizen criminal defendants should not see this safeguard effectively revoked because the federal government has taken a decade or more to initiate deportation proceedings and the state government has destroyed the relevant court records in the meantime. This result is particularly unwarranted when viable options exist to improve the fairness, efficiency, and legitimacy of the criminal deportation process.

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165. *In re Adamiak*, 23 I. & N. Dec. 878, 881 (B.I.A. 2006).