

IMMIGRATION LAW ISN'T SO "CIVIL" ANYMORE: THE CRIMINAL NATURE OF THE IMMIGRATION SYSTEM

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Immigration law finds its roots early in the creation of the United States. The Constitution gives Congress the power to enact laws governing the naturalization of non-citizens, underscoring the importance of both immigration and citizenship to this country.¹ The subsequent Naturalization Act of 1790 laid down the first requirements for obtaining citizenship² and helped set the precedent that immigration status, particularly citizenship, was a benefit to be given at the discretion of the government.³ Throughout the history of the United States, immigration law has developed into a complex area of civil law,⁴ reflecting the view that immigration law is a type of public benefit law.⁴ Immigrants who come to the United States are allowed to do so out of the good will of our lawmakers and our citizens. Thus, the taking away of immigration status should not be looked at as a punishment, but rather as a remedy for violating the laws of American society.⁵ This notion has been well established in immigration law since the Supreme Court's decision in *Fong Yue Ting v. United States*, in which the Court held that, because deportation was not a punishment for a crime, constitutional due

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¹ U.S. CONST. art. I, § 8, cl. 4 ("The Congress shall have power [t]o establish a uniform rule of naturalization").

² See Naturalization Act of 1790, ch. 3, 1 Stat. 103, 103–04 (1790) (repealed 1795) (allowing individuals to become citizens if they were "free white persons of good moral character" and had resided in the United States for at least two years).

³ While the Naturalization Act of 1790 did not explicitly state that citizenship was a "benefit," scholars have noted that the limitations of the act set the precedent for Congress determining who can be deemed suitable for citizenship in the United States. See, e.g., ERIKA LEE, *A Nation of Immigrants and a Gatekeeping Nation: American Immigration Law and Policy*, in *A COMPANION TO AMERICAN IMMIGRATION* 9 (Reed Ueda ed., 1st ed. 2011) (arguing that racial restrictions on citizenship established the government's "gatekeeper functions").

⁴ See *Chae Chan Ping v. United States*, 130 U.S. 581, 609 (1889) (finding that the government has the ability to revoke immigration licenses at any time because the licenses are "held at the will of the government").

⁵ See *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) ("A deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry The deportation hearing looks prospectively to the respondent's right to remain in this country in the future."); *Mahler v. Eby*, 264 U.S. 32, 39 (1924) ("It is well settled that deportation, while it may be burdensome and severe for the alien, is not punishment.").

process protections were not implicated in removal proceedings.⁶

Immigration law has certainly progressed since the Court's 1893 decision to protect non-citizens in removal proceedings. However, the idea that deportation is not a "punishment" and is thus separate from criminal law still drives U.S. immigration policy. Yet, the effects of deportation—and even the initiation of removal proceedings—on an individual and his or her community and family more closely reflect the damaging effects of the archaic criminal justice system than they do the taking away of a public benefit.⁷ And what is worse, even as criminal law has developed to reflect society's more modern view of the criminal justice system, policymakers have failed to adjust immigration laws to reflect those changes. In order to bring immigration law more into line with these developments in the criminal justice system, policymakers need to recognize the similar consequences these two areas of law have on U.S. society.

Reforms to the criminal justice system are nothing new,⁸ but recent developments in criminal law—such as the granting of pardons⁹ and the implementation of rehabilitation programs¹⁰—suggest that politicians and policymakers have finally recognized the detrimental effects of archaic laws and long prison sentences on communities and families. However, even as state legislators and other government officials have taken steps to bring criminal law into line with society's changing

⁶ *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893) (“[Deportation] is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation . . . has determined that his continuing to reside here shall depend.”).

⁷ This is not to belittle the hardships that come with the loss of unemployment or disability benefits. However, as will be discussed, the consequences of removal proceedings and deportation more closely reflect those of the criminal justice system by imprisoning individuals and separating families.

⁸ The U.S. criminal justice system saw its first reform efforts in the 1700s when William Penn, a Quaker, advocated for more humane housing for criminals. *THE SOCIAL HISTORY OF CRIME AND PUNISHMENT IN AMERICA: AN ENCYCLOPEDIA* 1335 (Wilbur R. Miller ed. 1st ed. 2012).

⁹ See, e.g., Jesse McKinley & James C. McKinley, Jr., *Cuomo Moves to Pardon Former Youthful Offenders*, N.Y. TIMES (Dec. 20, 2015), http://www.nytimes.com/2015/12/21/nyregion/cuomo-moves-to-pardon-former-youthful-offenders.html?_r=0 (discussing Governor Cuomo's plans to pardon certain “youthful offenders” in order to help them “get on with their life”).

¹⁰ Since the beginning of 2016, both the U.S. House of Representatives and the Governor of California have promoted initiatives that would allow for reduced jail times (or “sentencing credits”) for inmates who participate in rehabilitation programs. *The Latest: California governor proposes sentencing reforms*, ASSOCIATED PRESS (Jan. 27, 2016), <http://bigstory.ap.org/article/a6ef3410b9e2454f86122d8c6e9dd2c5/latest-california-governor-proposes-sentencing-reforms>; Mary Clare Jalonick, *House Bill Would Attempt to Better Rehabilitate Prisoners*, ASSOCIATED PRESS (Feb. 11, 2016), <http://bigstory.ap.org/article/4e3ada996c864944aeac87ae74c0a9bf/house-bill-seeks-better-rehabilitate-prisoners>.

values, immigration law seems stuck in the past—unable to reflect these changes. For instance, current immigration law makes any non-U.S. citizen residing in the United States deportable¹¹ if they have been convicted of an “aggravated felony”¹² or any number of other crimes,¹³ but the definition of a “conviction”¹⁴ in immigration law is much broader than the general laymen’s understanding of the word.¹⁵ This far-reaching definition means that even when a court has never formally found an individual to be guilty, the person may nevertheless have been “convicted” for immigration purposes if “the judge has ordered some form of punishment, penalty, or restraint on the [individual]’s liberty to be imposed.”¹⁶

A recent Human Rights Watch report highlighted the stories of non-citizens who have been deported after being convicted for minor drug convictions.¹⁷ The research found that between 2007 and 2012, over thirty-four thousand people whose most serious conviction was marijuana possession were deported.¹⁸ While proponents of deportation may argue most of these convictions occurred prior to the decriminalization of marijuana possession in many states, non-citizens nevertheless find themselves in removal proceedings for minor drug offenses,¹⁹ even with current changing sentiments toward minor drug

¹¹ 8 U.S.C. § 1227(a)(2) (2014) (stating that any non-citizen who has committed a crime enumerated in this section is “deportable” under U.S. immigration law).

¹² 8 U.S.C. § 1101(43) (2014) (outlining, in eleven subsections, specific crimes that can constitute an “aggravated felony”).

¹³ Immigration law and the deportability of a non-citizen is a complex issue. I chose to simplify the law for the purposes of this piece because a full review of this area of immigration law would require a more thorough analysis than is possible here.

¹⁴ In U.S. immigration law, a “conviction” includes more than just a formal judgment of guilt. *See* 8 U.S.C. § 1101(a)(48)(A). Even if there is no formal judgment rendered, the alien may still have a “conviction” if he or she entered a *nolo contendere* plea or if there was sufficient evidence to find guilt. § 1101(a)(48)(A)(i). Any judicial order that deprives the alien of his or her liberty is considered a conviction for immigration purposes. § 1101(a)(48)(A)(ii).

¹⁵ A conviction is generally defined as “the act or process of judicially finding someone guilty of a crime.” *Conviction*, BLACK’S LAW DICTIONARY (10th ed. 2014).

¹⁶ 8 U.S.C. § 1101(a)(48) (2014).

¹⁷ *A Price Too High: US Families Torn Apart by Deportations for Drug Offenses*, HUMAN RIGHTS WATCH (June 16, 2015), <https://www.hrw.org/report/2015/06/16/price-too-high/us-families-torn-apart-deportations-drug-offenses>.

¹⁸ *Id.*

¹⁹ For example, George Kidan, a non-U.S. citizen, who entered the United States on a student visa, helped his friend buy \$30 worth of marijuana in 1987 and was convicted of “trafficking in illicit drugs.” Twelve years later, he found himself in immigration detention because of that conviction, for which he received two years of probation and paid over \$1,000 in fines and restitution. Even after the governor of Ohio granted him an official pardon, Kidan has still found himself fighting to keep his immigration status. Christie Thompson, *Get Caught with Pot, Face Deportation*, THE MARSHALL PROJECT (June 16, 2015), <https://www.themarshallproject.org/2015/06/16/get-caught-with-pot->

convictions.²⁰ Some states, like California, have made efforts to bring the immigration consequences into conformity by actively changing criminal law to allow immigrants to remove the "conviction" from their record so that it will not result in the loss of immigration status.²¹ While these state efforts to minimize the consequences of past—perhaps, now considered unjust—criminal convictions for non-citizens are certainly improvements, there must be a comprehensive overhaul of *federal* immigration law to more appropriately protect non-citizens and their communities from the detrimental effects of deportation.²²

Although immigration reform has been on the congressional and presidential agenda many times since President Obama took office, there has yet to be a much-needed and comprehensive overhaul of the immigration system. In fact, the last time significant changes were made to existing immigration law was twenty years ago. The 1996 Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") not only broadened the definition of an "aggravated felony" in immigration law, but also increased the number of crimes that could qualify an

[face-deportation#.IUrJkIkV.](#)

²⁰ As of the end of 2015, four states and the District of Columbia have legalized marijuana possession, and sixteen other states have decriminalized possession. *State Laws*, NORML: WORKING TO REFORM MARIJUANA LAWS, <http://norml.org/laws> (last visited Feb. 15, 2016). Additionally, some states now have rehabilitation programs for nonviolent felony drug offenders as an alternative to imprisonment. *See, e.g., Drug Treatment Alternatives to Prison (DTAP) Program*, OFF. OF ALCOHOLISM AND SUBSTANCE ABUSE SERV., N.Y. STATE, <https://www.oasas.ny.gov/cj/alternatives/DTAP.cfm>. Last year, President Obama commuted the sentences for ninety-five prisoners, most of whom were convicted for drug offenses, which many saw as representation of the shift away from the "crackdown on crime" in the criminal justice system. Julie Hirschfeld Davis & Peter Baker, *In 'Fairness,' Obama Commutes Sentences for 95, Mostly Drug Offenders*, N.Y. TIMES (Dec. 18, 2015), http://www.nytimes.com/2015/12/19/us/politics/obama-commutes-sentences-of-95-prisoners-and-pardons-two.html?_r=0.

However, it is important to note that even with these improved rehabilitation programs and commutations of sentences, most non-citizens who have been "convicted" as per 8 U.S.C. § 1101(a)(48) will be deemed "deportable" regardless of whether society still deems them to be morally blameworthy or deserving of imprisonment. *See, e.g., HUMAN RIGHTS WATCH, supra* note 17 (detailing stories of individuals who have been sentenced to probation or have had sentences reduced only to find themselves facing deportation and finding that 260,000 individuals with minor drug convictions were deported between 2007 and 2012).

²¹ *See* CAL. PENAL CODE § 1203.43 (West 2016) (allowing individuals who have completed a "deferred entry of judgment program" to withdraw their guilty plea after completion of the program). The "deferred entry of judgment" program allows certain drug offenders to be admitted to certified drug programs rather than a prison sentence. CAL. PENAL CODE § 1000 (West 2016).

²² After all, immigration law has long been considered a matter of national interest and reserved for the federal government. *See* *Chae Chan Ping v. United States*, 130 U.S. 581, 604–10 (1889).

immigrant as “deportable.”²³ These changes in immigration law seem to run counter to the developments in the criminal justice system that recognize the need for economic stability and family cohesion in creating a more developed society. Both states and the federal government have implemented sentencing reforms and alternatives to imprisonment in order to create more stable communities.²⁴ At the same time, policymakers have increased bed quotas for immigration detention to promote the detention and deportation of individuals with immigration violations.²⁵ Yet, the long-term detention of immigrants has similar physical, psychological, and economic consequences as for criminal offenders serving long sentences.²⁶ Moreover, deportation can lead to the

²³ Pub. L. No. 140–208, div. C, 110 Stat. 3009 (1996). For a more in-depth look at how IIRIRA transformed immigration law to focus more on criminal convictions, see *Deportation Law Based on Criminal Convictions After 1996, in Forced Apart: Families Separated and Immigrants Harmed by United States Deportations*, HUMAN RIGHTS WATCH (July 16, 2007), <https://www.hrw.org/report/2007/07/16/forced-apart/families-separated-and-immigrants-harmed-united-states-deportation>.

²⁴ In 2014, the U.S. Department of Justice worked with the U.S. Sentencing Commission to make reduced sentences retroactively available for certain nonviolent drug offenders. See Evan Perez, *Holder endorses shorter sentences for drug offenders now in prison*, CNN (June 10, 2014), <http://www.cnn.com/2015/10/21/us/prison-reform-overview/>. Additionally, many states, including California and Texas, have made efforts to create rehabilitation alternatives for nonviolent drug offenders. See *supra* text accompanying note 21; Reid Wilson, *Tough Texas gets results by going softer on crime*, THE WASH. POST (Nov. 27, 2014), <https://www.washingtonpost.com/blogs/govbeat/wp/2014/11/27/tough-texas-gets-results-by-going-softer-on-crime/>.

²⁵ The “immigration detention bed mandate” requires Immigration and Customs Enforcement to fill a certain number of beds in its detention facilities in order to receive congressional appropriations. See *Immigration Detention Bed Mandate*, U.S. CONF. OF CATHOLIC BISHOPS: OFF. OF MIGRATION POL’Y AND PUB. AFF., <http://www.usccb.org/about/migration-policy/position-papers/upload/Detention-Bed-Mandate-1pager2-25-14.pdf> (last visited Feb. 15, 2016). The bed quota increased by forty bed spaces for the 2016 fiscal year. See *Immigration Detention Bed Quota Timeline*, NAT’L IMMIGRANT JUST. CTR. (Fall 2015), <http://www.immigrantjustice.org/immigration-detention-bed-quota-timeline>.

²⁶ Numerous complaints have been filed with the U.S. Department of Justice’s Office for Civil Rights and Civil Liberties (“CRCL”) regarding the psychological and physical impacts of family detention since its return in 2014. See Seth Robbins, *Complaint: Family Detention Can Lead to Psychological Harm*, ASSOCIATED PRESS (June 30, 2015), <http://bigstory.ap.org/article/49fed1f0dce2450eb30cdd4d7a1eb675/complaint-family-detention-can-lead-psychological-harm> (discussing the June 30, 2015 complaint to CRCL regarding the psychological issues, “including anxiety, depression, and suicidal thoughts,” facing many detained women and children); *CRCL Complaint Details How Family Detention Facility Endangers Incarcerated Mothers and Children*, AM. IMMIGR. LAW. ASS’N (Oct. 6, 2015), <http://www.aila.org/advo-media/press-releases/2015/crcl-complaint-family-detention> (citing multiple incidents of medical neglect in family detention facilities). One mental health professional found that “[t]he ongoing stress, despair, and uncertainty of detention compromises children’s intellectual and cognitive development and contributes to the development of chronic

permanent separation of families, which only exacerbates the issues presented by detention.²⁷ In his 2010 opinion in *Padilla v. Kentucky*, Justice Stevens even noted that although deportation is a civil law remedy rather than a criminal punishment, the effects of deportation are severe enough to necessitate additional protections for non-citizen defendants in criminal cases.²⁸ By failing to address the damaging and long-lasting effects of archaic immigration laws, policymakers are ignoring how intimately immigrant communities are connected with American society as a whole.²⁹

illnesses.” Declaration of Luis H. Zayas at 5, *R.I.L.R. v. Johnson*, 80 F. Supp. 3d. 164 (D.D.C. 2015) (No. 1:15-cv-00011-JEB), 2014 WL 8728199. Recent studies have also noted that the arrest of a family member can result in the loss of income for a family and have negative effects on school performance and other relationships for children, especially those who many not have known that they lack legal status prior to their parent’s arrest. See, e.g., RANDY CAPPS ET AL., *IMPLICATIONS OF IMMIGRATION ENFORCEMENT ACTIVITIES FOR THE WELL-BEING OF CHILDREN IN IMMIGRANT FAMILIES* 10 (2015).

Similarly, studies on criminal convictions have shown that the incarceration of a parent can also lead to changes in family dynamics, income levels, and children’s mental health. See, e.g., Jeremy Travis et al., *Families Left Behind: The Hidden Costs of Incarceration and Reentry*, JUST. POL’Y CTR., URB. INST., 2–6 (Oct. 2003), <http://www.urban.org/sites/default/files/alfresco/publication-pdfs/310882-Families-Left-Behind.PDF>. Researchers have also found that communities with high incarceration rates are often “infected” with mental health issues, including generalized anxiety disorder and major depressive disorder, noting that these health effects are often interrelated to economic hardships. See Emily Von Hoffman, *How Incarceration Infects a Community*, THE ATLANTIC (Mar. 6, 2015), <http://www.theatlantic.com/health/archive/2015/03/how-incarceration-infects-a-community/385967/>.

²⁷ Similar to the impacts of immigration detention, deportation often leads to the dissolution of family units, which can negatively impact children’s mental health—sometimes leaving them “orphaned.” See CAPPS ET AL., *supra* note 26, at 12–14; Lauren Gambino, *Orphaned by deportation: the crisis of American children left behind*, THE GUARDIAN (Oct. 15, 2014), <http://www.theguardian.com/us-news/2014/oct/15/immigration-boy-reform-obama-deportations-families-separated>; Cindy Y. Rodriguez & Adriana Hauser, *Deportations: Missing parents, scared kids*, CNN (Oct. 27, 2013), <http://www.cnn.com/2013/10/26/us/immigration-parents-deported-children-left-behind/>.

²⁸ *Padilla v. Kentucky*, 559 U.S. 356, 387–88 (2010) (finding that criminal defense attorneys are constitutionally required to inform a noncitizen defendant of the immigration consequences of his plea in a criminal case). In his opinion, Justice Stevens wrote: “The severity of deportation—the equivalent of banishment or exile—only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation.” *Id.* at 373–74 (internal citations omitted).

²⁹ For example, recent immigration raids on families who have failed to obtain asylum in the United States led one school superintendent to ask immigration officials to consider schools a “safe zone” because school attendance dropped significantly. See *Attendance Drops at Maryland High School, As Deportation Fears Rise*, NPR (Jan. 17, 2016), <http://www.npr.org/2016/01/17/463405722/attendance-drops-at-maryland-high-school-as-deportation-fears-rise>.

The consequences of an enforcement-centered immigration system are long lasting and detrimental not only for those individuals faced with the harsh realities of an unsympathetic immigration system but also for society as whole. While violations of immigration law should not be dealt with as criminal offenses—immigration law is, after all, a benefits-based, civil law system; lawmakers should recognize that current immigration policies more closely mirror the criminal justice system than any other civil proceeding. If such criminal-focused policies are to continue, then immigration law reforms need to also reflect the society's changing views of the criminal justice system, taking into account the negative impacts detention and deportation can have on families and communities.